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No. 94-98

In The

Supreme Court of the United States

October Term, 1994

SOUTHERN OHIO COAL COMPANY,

Petitioner,

v.

OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

D. MICHAEL MILLER
(Counsel of Record)
ALVIN J. MCKENNA
MARK S. STEMM
JANET J. HENRY
ALAINE Y. MILLER
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215-6194
(614) 227-2000

Counsel For Petitioner, Southern Ohio Coal Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Under the Federal Water Pollution Control Act Amendments of 1972 (the "Clean Water Act" or "CWA") and the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), the United States Environmental Protection Agency ("U.S. EPA") and the Office of Surface Mining of the Department of Interior ("OSM") respectively have delegated to Ohio regulatory agencies responsibility and authority for administering and enforcing within the State the National Pollutant Discharge Elimination System ("NPDES") permitting program of the CWA and SMCRA-consistent State standards. Pursuant to its duly delegated authority, the Ohio Environmental Protection Agency ("Ohio EPA") authorized Southern Ohio Coal Company ("SOCCO") to bypass its treatment facilities and discharge, with alternative treatment, water which unexpectedly had entered and threatened one of the nation's largest active underground coal mining complexes. Pursuant to its delegated authority, Ohio's Division of Reclamation ("Ohio DOR") issued a cessation order, which was appealed and temporarily stayed by the federally-approved appeals board, the Ohio Reclamation Board of Review ("Ohio RBR"). OSM, and later U.S. EPA, each issued subsequent orders attempting to veto the bypass authorization and the temporary stay. The District Court enjoined U.S. EPA and OSM from ordering cessation of such State-authorized discharge.

The questions presented are:

1. Whether the actions of U.S. EPA and OSM, which directly interdicted the federally-approved processes and

QUESTIONS PRESENTED – Continued

decisions of their State counterparts, exceeded the federal agencies' statutory authority, thereby giving rise to federal court jurisdiction?

2. Whether denial of federal district court jurisdiction over the actions and threatened actions of U.S. EPA and OSM deprived SOCCO of due process of law in contravention of the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The parties before this Court are identical to the parties to the proceedings below. Such parties are the Petitioner Southern Ohio Coal Company and the Respondents Office of Surface Mining, Reclamation and Enforcement, Department of the Interior; Richard Seibel, Field Office Director for the Office of Surface Mining; Robert Urum, Director of the Office of Surface Mining; the United States Environmental Protection Agency; Carol Browner, Administrator of the United States Environmental Protection Agency; and Valdas Adamkus, Administrator of Region V of the United States Environmental Protection Agency. (Mr. Urum has been automatically substituted for W. Hord Tipton who served as Acting Director of the Office of Surface Mining during the proceedings below.)

RULE 29.1 LIST

Petitioner Southern Ohio Coal Company is a wholly owned subsidiary of Ohio Power Company which, in turn, is wholly owned by American Electric Power Company, Inc., a publicly-held company.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Southern Ohio Coal Company, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on April 8, 1994.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at 20 F.3d 1418, and is reprinted in the Appendix hereto, p. 1a, *infra*.

The Order of the United States District Court for the Southern District of Ohio granting preliminary injunctive

relief was entered on August 19, 1993, and is reported at 831 F.Supp. 1324. That Order is reprinted in the Appendix hereto at p. 25a.

JURISDICTION

On April 8, 1994, the Court of Appeals for the Sixth Circuit entered Judgment reversing the Order of the District Court of the Southern District of Ohio and remanding the case with instructions to dismiss for lack of jurisdiction. By Order filed May 31, 1994 (a copy of which is reprinted in the Appendix hereto at p. 60a), the Court of Appeals denied a timely Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The constitutional provisions, statutes, and regulations involved in the case are: the Fifth Amendment to the United States Constitution; 30 U.S.C. §1201(f); 30 U.S.C. §1202(g); 30 U.S.C. §1253(a); 30 U.S.C. §§1271(a)(1) and (2); 30 U.S.C. §1275(c); 30 U.S.C. §1276; 33 U.S.C. §1251(b); 33 U.S.C. §1319(a); 33 U.S.C. §1342(b); Ohio Revised Code §1513.02(D)(1); Ohio Revised Code §1513.13(A),(B),(C); and 40 C.F.R. §122.41(m). The text of these relevant constitutional provisions, statutes, and regulations are reprinted in the Appendix.

STATEMENT OF THE CASE

This case came before the United States Court of Appeals for the Sixth Circuit on an interlocutory appeal by Respondents from an Order by the United States District Court for the Southern District of Ohio preliminarily enjoining Respondents from acting to stop, interfere with, or delay the implementation of a plan approved by the Director of the Ohio EPA, and authorized under an order

for temporary relief issued by the Ohio RBR, to bypass SOCCO's water treatment facilities and utilize alternative treatment and discharge locations in order to remove water from SOCCO's underground coal mine unless the "approved state agencies fail to act vigorously, expeditiously, and in accordance with law." (District Court Order, Appendix at p. 59a.)

SOCCO filed a Complaint and an Amended Complaint for declaratory judgment and injunctive relief against Respondents on July 29, 1993, and August 4, 1993, respectively. Those pleadings indicated that through their actions and proposed actions, Respondents exceeded their statutory authority and violated SOCCO's due process rights. SOCCO invoked the jurisdiction of the District Court pursuant to 28 U.S.C. §1331, 28 U.S.C. §1337, 28 U.S.C. §2201, 30 U.S.C. §1276, 5 U.S.C. §702, and the Fifth Amendment to the United States Constitution.

SOCCO's Complaint against Respondents resulted from actions taken, or threatened to be taken, by Respondents regarding SOCCO's Meigs Mine No. 31, after approximately one billion gallons of water from an abandoned adjacent portion of the mine suddenly entered the active workings of Mine No. 31 on July 11, 1993. SOCCO promptly responded to this catastrophic occurrence by meeting with representatives from various Ohio and federal agencies and retaining expert consultants from various disciplines to assist SOCCO in developing and implementing a plan to dewater and recover the mine. The volume of water in the mine, and the need to remove the water quickly to avoid irreparable damage to the mine structure and equipment, made the use of SOCCO's existing water treatment works infeasible. (District Court Order, App. at pp. 27a-28a.) The complexity of the challenge to recover the mine and the equipment trapped there was compounded by the fact that with each passing hour the mine further deteriorated. The water threatened the structural integrity of the mine by causing the roof

and ribs (wall supports) to deteriorate. (*Id.* at p. 28a.) Experts concluded that unless the water could be evacuated quickly, Mine No. 31 no longer could be mined safely. (*Id.*)

SOCCO settled upon an evacuation plan that included the drilling of bore holes at various locations and the release of water, with limited treatment, into streams that feed eventually into the Ohio River. (*Id.*) SOCCO's expert consultants determined that the proposed evacuation plan would have no permanent effects on the environment, because the only affected aquatic life would renew itself completely within one to two years. (*Id.* at p. 29a.) In their July 23, 1993 Report, OSM's own technical personnel concurred that the pumping was necessary to save the mine and that "once the pumping stopped, the water would quickly return to normal and fish and mobile aquatic species would repopulate the effected [sic] reaches of stream from upstream, the Ohio River and the tributaries to Leading Creek." (Richard Seibel at Tr. III, pp. 3-5, 14.)

SOCCO sought approval of its plan from Ohio EPA, the State agency to which U.S. EPA has delegated authority to administer and enforce in Ohio the NPDES permitting program of the Clean Water Act, 33 U.S.C. §§1251 *et seq.*, which regulates the discharge of industrial wastewater, including water from coal mines, into U.S. waters. As required by federal law, SOCCO's existing NPDES permit provided for emergency bypass of its water treatment facilities if no feasible alternatives exist and the bypass is necessary to protect SOCCO's property from severe damage. The Ohio EPA approved SOCCO's plan as an emergency bypass under SOCCO's permit and added requirements designed to minimize environmental effects. (District Court Order, App. at pp. 31a, 33a.)

Before SOCCO could implement its Ohio EPA-approved mine recovery plan, the Ohio DOR, the State agency possessing "primacy" jurisdiction to enforce State

law enacted consistent with SMCRA, 30 U.S.C. §§1201 *et seq.*, issued a cessation order to stop recovery operations. (*Id.* at p. 31a.) SOCCO promptly appealed the cessation order to the SMCRA-approved Ohio RBR using the temporary relief procedure established by Congress and incorporated in Ohio's regulatory program. Finding that SOCCO satisfied the criteria for temporary relief under Ohio's federally-approved regulatory program, the Ohio RBR, following an expedited hearing, granted SOCCO a temporary stay of the Ohio DOR cessation order. (*Id.*)

Upon issuance of the stay, SOCCO prepared to implement its Ohio EPA-approved mine recovery plan. However, before SOCCO could begin pumping water out of the mine, OSM stepped in and issued another cessation order, duplicative of the Ohio DOR's order. (*Id.* at pp. 31a-32a.) As a result of OSM's refusal to respect the validity of the temporary relief from Ohio DOR's cessation order which SOCCO had obtained, SOCCO sought protection from the United States District Court for the Southern District of Ohio by filing a Complaint and Motions for temporary and preliminary injunctive relief, alleging that OSM's actions and threatened actions were beyond its statutory authority and in violation of SOCCO's right to due process of law. On July 30, 1993, the District Court conducted a hearing and issued an Order nullifying the federal cessation order and prohibiting OSM and its officials from interfering with the ongoing State administrative proceedings conducted pursuant to the federal standards incorporated in Ohio's federally-approved program. (*Id.* at pp. 32a-33a.)

Upon issuance of this Order, SOCCO began pumping water from Mine No. 31. However, on August 3, 1993, SOCCO was advised by U.S. EPA that unless SOCCO voluntarily ceased pumping, U.S. EPA intended to issue an administrative order requiring the immediate cessation of mine recovery activities while U.S. EPA independently investigated alternatives to the mine recovery plan

which had been approved by Ohio EPA. (*Id.* at p. 33a.) On August 4, 1993, SOCCO amended its Complaint and moved for temporary and preliminary injunctive relief against U.S. EPA, its Administrator, and the Administrator for U.S. EPA's Region V. The District Court granted SOCCO a Temporary Restraining Order on August 4, 1993. On August 11, 12, and 13, 1993, the District Court conducted an extensive preliminary injunction hearing during which the court received trial briefs, evidence from 22 witnesses, and nearly 100 exhibits from all parties.

The District Court, on August 19, 1993, issued an Order granting SOCCO's motion for a preliminary injunction against both OSM and U.S. EPA. In its Order, the District Court found that SOCCO's Amended Complaint sought relief from the actual and threatened exercise of authority by federal agencies beyond their statutory authority. (District Court Order, App. at p. 36a.) The court concluded that federal courts have jurisdiction to intervene when federal agencies are acting manifestly beyond the authority granted to them by statute and to enjoin such actions where irreparable harm would otherwise result. (*Id.* at pp. 37a, 54a-58a.) The court rejected U.S. EPA's characterization of the jurisdictional issue as one of whether a federal court may review an administrative order of U.S. EPA. (*Id.* at pp. 36a, 40a.) Citing this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), the District Court noted that judicial review of federal agency orders is permissible and appropriate "unless Congress has by explicit language precluded such review." (*Id.* at p. 39a.)

Having determined that it had jurisdiction to consider SOCCO's request for relief, the District Court went on to hold that U.S. EPA lacked authority to "act in the face of a state approved agency's prior action." (*Id.* at p. 51a.) In reaching this conclusion, the District Court noted that 33 U.S.C. §1251(b) sets forth the policy of Congress to

"recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution." (*Id.* at p. 46a.) The District Court stated that the legislative history of the CWA makes clear that where a State agency to which U.S. EPA has delegated authority to administer and enforce the CWA already has taken action, Congress intended U.S. EPA to act *only* when the State agency is " 'not acting expeditiously and vigorously to enforce control requirements.' " (*Id.* at p. 48a) [quoting Senate Report No. 92-414, 92nd Congress, 2nd Session (1972)]. The court determined that Ohio EPA had acted expeditiously and vigorously with regard to Mine No. 31, and that in the absence of any statutory override authority, U.S. EPA lacked authority to exercise jurisdiction. (*Id.*) The court also reaffirmed the reasoning of its July 30, 1993 Order against OSM and held that OSM was without jurisdiction to interfere with the State administrative processes which were proceeding in accordance with the applicable federally-approved statutory procedures. (*Id.* at p. 58a.)

The District Court further found that SOCCO had met the criteria for issuance of a preliminary injunction. Accordingly, the District Court issued a preliminary injunction enjoining U.S. EPA and OSM from acting "to effect the cessation of pumping at Meigs 31 unless their respective parallel approved state agencies fail to act vigorously, expeditiously, and in accordance with law." (*Id.* at p. 59a.)

Respondents appealed the District Court's preliminary injunction Order to the United States Court of Appeals for the Sixth Circuit on an interlocutory basis pursuant to 28 U.S.C. §1292(a). Respondents challenged the Order, alleging that the District Court lacked subject matter jurisdiction. In an Opinion issued on April 8, 1994, the Sixth Circuit held that the District Court had erred in exercising jurisdiction over both OSM and U.S. EPA. (Sixth Circuit Opinion, App. at p. 2a.) The court based its

decision with regard to OSM on its conclusion that SOCCO was required to exhaust the federal administrative remedy, notwithstanding SOCCO's undertaking of the identical procedure on the State level. Although SOCCO challenged OSM's jurisdiction and the lack of due process, the court found that no exception to the exhaustion doctrine applied. (*Id.* at pp. 12a-17a.)

With regard to U.S. EPA, the court found that SOCCO, in essence, was requesting the District Court to review a pre-enforcement compliance investigation by U.S. EPA and that the District Court lacked jurisdiction over such pre-enforcement compliance efforts. (*Id.* at p. 21a.) The Sixth Circuit also held that U.S. EPA's threatened action was supported by statutory authority under the Clean Water Act. (*Id.* at pp. 23a-24a.)

Based on its findings, the Sixth Circuit reversed the judgment of the District Court and remanded the case with instructions to dismiss for lack of jurisdiction.

On April 22, 1994, SOCCO petitioned for rehearing with the Sixth Circuit. By Order issued May 31, 1994, the Sixth Circuit denied SOCCO's Petition for Rehearing. (Sixth Circuit Order, App. at p. 60a.) On June 15, 1994, the Court of Appeals granted SOCCO's Motion for a Stay of Mandate pending this Court's consideration of this Petition.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case exemplifies, as the District Court found, the "extraordinarily serious" harm that may befall workers, a company, and a community when they become pawns in a jurisdictional turf battle between State and federal agencies. (District Court Order, App. at p. 56a.) Private businesses are subject to increasing regulatory scrutiny and deserve a clear delineation of standards as to when federal or State regulatory power applies. The District

Court undertook a reasoned analysis of the federal-state partnerships created by the CWA and SMCRA and, unlike the Sixth Circuit, delineated the statutory responsibilities and constitutional limitations of the regulatory schemes envisioned by Congress. Left undisturbed, the Sixth Circuit's decision will provide a shield for agency action in excess of its statutory authority, eviscerate the authority granted to federally-approved State programs under SMCRA and the CWA, and destroy the underlying premises of "cooperative federalism" – a respect for the technical expertise of sister State-level agencies and the regulated community's ability to place substantial reliance on the considered decisions of the State agencies approved under federal law to administer these programs – upon which nearly all modern federal environmental, safety, and health regulation is based. The Sixth Circuit's decision reduces the role of federally-approved State agencies to that of mere "monitors," whose actions have no legal or practical effect.

Therefore, the decision of the United States Court of Appeals for the Sixth Circuit should be reviewed and reversed because:

(A) the decision of the Sixth Circuit conflicts with decisions of this Court such as *Leedom v. Kyne*, 358 U.S. 184 (1958), and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), by failing to recognize and preserve the opportunity for judicial review of agency action where: a manifest infringement of substantial rights is irremediable by statutorily prescribed methods of review; there is no clear administrative remedy prescribed by statute, or such a remedy, even if available, would be rendered meaningless by delay; the Sixth Circuit's decision further conflicts with decisions of other federal Courts of Appeals, including *Central Hudson Gas & Elec. Corp. v. U.S. EPA*, 587 F.2d 549 (2d Cir. 1978), *Champion Int'l Corp. v. U.S. EPA*, 850 F.2d 182 (4th Cir. 1988), and *Swanson v. United States*, 789 F.2d 1368 (9th Cir. 1986), and several decisions by federal

district courts, which have confirmed that those district courts have jurisdiction to determine the scope of agency authority, and, in appropriate circumstances, to restrain the exercise of agency authority withheld under the Clean Water Act;

(B) the Sixth Circuit's denial of federal court jurisdiction over U.S. EPA's actions violates SOCCO's due process rights by forcing SOCCO either to comply with a disputed agency order or to face accrual of serious civil and criminal sanctions without recourse to timely judicial review;

(C) the Sixth Circuit's decision denies review of OSM's disregard for the results of the SMCRA-designated appellate process incorporated in the federally-approved Ohio regulatory program applicable to all coal mining operations in Ohio and, thus, conflicts with decisions of this Court, such as *Leedom v. Kyne*, 358 U.S. 184 (1958), by its failure to recognize and preserve the opportunity for judicial review of agency action where a mine operator would otherwise suffer a manifest infringement of its statutory right to expeditious, post-deprivation temporary relief from an immediate cessation order; the Sixth Circuit's decision thereby only exacerbates the deprivation by forcing the operator to duplicate its exhaustion of the identical appellate relief procedure on the federal administrative level; and further, by sanctioning OSM's infringement on the State regulatory program, the Sixth Circuit's decision substantially erodes the "primacy" jurisdiction Congress committed to States pursuant to SMCRA; and

(D) the Sixth Circuit misapplies this Court's decision in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), in using it as its principal reason for rejecting the federal jurisdictional basis to consider SOCCO's due process challenge to OSM's interference with the operation of Ohio's federally-approved regulatory program and, in doing so, effectively, but

wrongly, decides an important issue of constitutional law which has not been, but should be, decided by this Court.

A. The Sixth Circuit's Decision Conflicts With The Decisions Of This Court And Other Courts Of Appeals By Failing To Recognize And Preserve An Opportunity For Judicial Review Of The United States Environmental Protection Agency's Action In Excess Of Its Delegated Authority Under The Clean Water Act.

The Sixth Circuit's decision completely disregards SOCCO's challenge to U.S. EPA's exercise of claimed authority to second-guess the determination by the Director of Ohio EPA to approve SOCCO's request for an emergency bypass. (Sixth Circuit Opinion, App. at p. 18a.) Instead, without examining the basis for the action threatened and ultimately taken by U.S. EPA, the Sixth Circuit adopted a sweeping declaration that federal district courts have no jurisdiction to review "pre-enforcement compliance orders" issued by U.S. EPA under Section 309(a)(3) of the CWA, 33 U.S.C. §1319(a)(3). This broad declaration directly conflicts with the prior decisions of this Court and other Courts of Appeals, which have maintained that federal courts have an obligation to investigate the basis for the exercise of delegated authority by a federal agency when such action threatens the regulated community with an infringement of substantial rights, and there is no statutorily prescribed avenue for direct review.

In obtaining Ohio EPA's approval of its request for a temporary emergency bypass to facilitate the evacuation of water from Mine No. 31, SOCCO acted in accordance with its NPDES permit, and the federal regulation upon which the bypass provision in its permit is based, 40 C.F.R. §122.41(m)(4). Both the regulation and the permit provision direct a permittee, like SOCCO, to request

approval for an emergency bypass *from the State Director*.[1] Unlike the issuance of an NPDES permit, 33 U.S.C. §1342(d), certain modifications of those permits, 40 C.F.R. §122.62, or the issuance of variances, 40 C.F.R. §124.62, *no* independent role to review or approve the bypass decision was reserved for U.S. EPA.

Nevertheless, shortly after commencement of the evacuation of water from the mine pursuant to the emergency bypass, U.S. EPA informed SOCCO that if the bypass was not terminated voluntarily, the agency would issue an order requiring immediate cessation of the bypass so that U.S. EPA independently could investigate available alternatives.[2] SOCCO, having satisfied the State regulatory agency, and in the absence of any retained authority in U.S. EPA to oversee that approval, sought the protection of the District Court from this unauthorized action by U.S. EPA.

U.S. EPA's actions directly threatened to impair SOCCO's right to proceed with the emergency bypass

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[1] The preamble to the original bypass regulation adopted by U.S. EPA states unequivocally that the State Director is "*solely responsible* for a determination concerning the acceptability of a bypass." 43 *Fed. Reg.* 37080 (August 21, 1978) (emphasis added).

[2] The bypass regulation and permit provision require Ohio EPA to evaluate whether feasible alternatives to the bypass exist, and to balance the availability of alternatives and the threat of severe property damage against the anticipated adverse effects of the bypass, *prior* to approving the bypass. 40 C.F.R. §122.41(m)(4)(i),(ii). Thus, the responsible regulatory official – the Ohio EPA Director – already had undertaken the appropriate analysis, and there was no basis for duplicative review by U.S. EPA. The District Court recognized that U.S. EPA could commence an independent investigation at any time, and merely restrained U.S. EPA from requiring SOCCO to terminate the State-approved bypass while U.S. EPA conducted its investigation. (District Court Order, App. at p. 48a.)

authorized by its permit, and approved by Ohio EPA, to secure relief from the situation which placed the entire Meigs Mine complex at risk. Ultimately, after the Sixth Circuit's issuance of a limited stay of the District Court's Order, U.S. EPA chose to compel SOCCO to terminate utilization of the emergency bypass by issuing a compliance order under Section 309(a)(3) of the CWA, 33 U.S.C. §1319(a)(3).[3] However, only if such an order includes an assessment of a civil penalty is there an express provision for administrative or judicial review of a compliance order. 33 U.S.C. §1319(g). And, contrary to the Sixth Circuit's statement, (Sixth Circuit Opinion, App. at p. 20a), violations of a compliance order are enforceable by the agency separate and apart from the alleged underlying violation of the requirements of the CWA. 33 U.S.C. §1319(d). Yet, there is no express statutory provision for review of a compliance order issued without civil penalties.[4] Thus, for permittees like SOCCO, the issuance of a

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[3] U.S. EPA's compliance order was issued September 3, 1993, but the time for compliance was extended by agreement of the parties until September 7, 1993. SOCCO was required to terminate use of the emergency bypass within 24 hours, and SOCCO ceased pumping water from the mine on September 8, 1993. The District Court issued a second Order on September 8 that allowed SOCCO to resume pumping. Utilization of the alternate discharge locations was terminated on September 16, 1993, when the volume of water being evacuated from the mine was able to be fully treated through SOCCO's then-expanded treatment system. SOCCO continues to otherwise comply with the requirements of Ohio EPA's bypass order, including the monitoring, reporting, and restoration obligations under the order.

[4] Indeed, there is no statutory requirement for the agency even to consult informally with a permittee before or after the issuance of a compliance order, unless the order alleges a violation under 33 U.S.C. §1318, which contains recordkeeping and information gathering requirements.

compliance order without civil penalties merely "doubles the stakes" by escalating the potential accrual of penalties if the agency chooses to bide its time prior to initiating enforcement. A determination by this Court on the issue of federal court jurisdiction is therefore of great import to the regulated community which, under the Sixth Circuit's decision, can be subject to the accrual of massive civil penalties without an opportunity for timely judicial review of the agency action.

This Court's prior cases demonstrate that there is a presumption in favor of judicial review for one "suffering legal wrong because of agency action," so long as no statute precludes review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). A statute which contains explicit provisions for review of certain actions does not necessarily indicate Congressional intent to preclude other forms of review. Moreover, where the absence of jurisdiction in the federal courts under their general jurisdiction would lead to sacrifice or obliteration of a right which Congress has given, and there is no other means within the control of the injured party to enforce that right, this Court steadfastly has defended the entitlement to judicial protection of those rights from agency action taken in excess of delegated powers. *Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

"Clear and convincing" evidence of Congressional intent to preclude review of agency actions has been required by this Court. *Abbott Laboratories*, 387 U.S. at 141. The Sixth Circuit's decision, and the cases relied on by that panel, provide no such "clear and convincing" evidence of preclusive Congressional intent. Indeed, the primary cases relied on as supporting the implied preclusion of federal district court jurisdiction, *Southern Pines Assoc. v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990), and *Hoffman Group, Inc. v. EPA*, 902 F.2d. 567, 569 (7th Cir. 1990), contain only the most cursory examination of the

structure of the CWA, and instead are founded on seemingly analogous provisions in the Clean Air Act, 42 U.S.C. §§7401 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601 *et seq.* However, both of those statutes, unlike the CWA, contain *express* prohibitions on judicial review except in accordance with the limited avenues prescribed in those statutes. 42 U.S.C. §7407(e); 42 U.S.C. §9613(h). Moreover, both *Southern Pines* and *Hoffman Group*, as well as their progeny, concern compliance orders which required the submission of permit applications *and* commencement of the administrative process which is designed specifically for resolution of disputed issues over the geographic extent of the agency's jurisdiction over wetlands. In this case, no administrative process was ever contemplated or pursued by the agency. Rather, U.S. EPA was content to issue an administrative compliance order requiring SOCCO to terminate the emergency bypass, and to rely on the coercive effect of the threat of civil and criminal sanctions to forestall any further utilization of the bypass, while at the same time maintaining that SOCCO had no right to *any* type of due process in the absence of an agency-initiated enforcement action.[5] *Compare, Thunder Basin Coal Co. v. Reich*, ___ U.S. ___, 114 S.Ct. 771 (1994) [pre-enforcement review precluded where legislative history of Mine Safety and Health Act demonstrated intent of Congress to foreclose federal court review and Act provided opportunity for operator

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[5] To date, no enforcement action has been initiated by the agency. Thus, in the absence of the District Court's protection, SOCCO would have been forced to risk the total loss of its mine, or the imposition of exorbitant penalties if it continued to evacuate water pursuant to the State-approved bypass, contrary to the compliance order.

to request that administrative agency expedite proceedings and to request temporary relief from orders pending review].

The appropriate analysis of the CWA under the circumstances of this case is contained in *Central Hudson Gas & Elec. Co. v. U.S. EPA*, 587 F.2d 549 (2d Cir. 1978), and *Champion Int'l Corp. v. U.S. EPA*, 850 F.2d 182 (4th Cir. 1988).[6] In each of these cases, regulated entities sought federal district court review of federal agency action exceeding the statutory authority of the agency, and in direct contravention of a prior action issued by an approved State program director. And, in each case, the appellate court confirmed that federal district courts maintain a residuum of general jurisdiction that supplements the statutorily-prescribed avenues for judicial review, and provides a remedy where none would otherwise exist to forestall the impairment of substantial rights. The district courts have jurisdiction to entertain a suit alleging that agency action is unauthorized by statute, and to determine whether the agency has exceeded its delegated authority. *Champion Int'l Corp.*, 850 F.2d at 185-86. Absent review by this Court, permittees in the Sixth Circuit (unlike their counterparts in the Fourth, Second, and Ninth Circuits) will be subject to federal compliance orders which second-guess determinations of issues which have been delegated to approved State agencies pursuant to federal statutes and regulations, and

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[6] *See also Conoco, Inc. v. Gardebring*, 503 F.Supp. 49 (N.D. Ill. 1980) [pre-enforcement review of compliance order issued under CAA available in federal district court]; *Ashland Oil, Inc. v. McDonald*, Case No. 79-338, *unreported* (N.D. Ohio 1980); *Swanson v. United States*, 600 F.Supp. 802 (N.D. Calif. 1985), *aff'd* 789 F.2d 1368 (9th Cir. 1986) [review of compliance order available under CWA]; and *Friends of the Crystal River v. U.S. EPA*, 794 F.Supp. 674 (W.D. Mich. 1992).

to the threat of civil and criminal sanctions without timely recourse to federal judicial review.

The Sixth Circuit has created a dangerous and broadly-crafted haven for unauthorized agency action by precluding any review of any compliance order, regardless of the basis (or lack of basis) therefor. Such a rule has never been endorsed by this Court, conflicts with the above-cited authorities from this Court and other Circuits, and presents compelling issues deserving of review by this Court.

B. By Denying Federal Court Review Of The United States Environmental Protection Agency's Action The Sixth Circuit Has Precluded Southern Ohio Coal Company From Obtaining Due Process Of Law As Guaranteed By The Constitution Of The United States.

The circumstances of this case also demonstrate in a dramatic way the deprivation of due process which occurs if general federal jurisdiction does not provide an opportunity for timely review of compliance orders under the CWA. With no statutory requirement to conduct further formal or informal administrative procedures, and absent jurisdiction in the District Court, U.S. EPA can blithely ignore the substantial challenge presented by SOCCO to U.S. EPA's decision to override the State-approved bypass. And SOCCO would be confronted with a classic "Hobson's choice": either "voluntarily" adhere to the disputed compliance order issued by U.S. EPA, and risk the very real probability of the loss of its mine, trapped equipment, and entire business; or try to preserve its mine, trapped equipment, and business -- as well as the jobs of its employees and its contribution to the already debilitated economy of southeastern Ohio -- by utilizing the emergency bypass, at the risk of incurring serious and daily escalating civil and criminal sanctions. Federal courts have not hesitated to examine agency

action immediately where no effective administrative remedy is provided to eliminate such competing risks.

The Sixth Circuit failed to address the constitutional issues raised by SOCCO in its analysis of U.S. EPA's actions. However, just six weeks later, in *Allsteel, Inc. v. U.S. EPA*, Case No. 94-3179, 1994 U.S. App. LEXIS 12385, 38 Env't Rep. Cas. (BNA) 1697 (6th Cir. May 26, 1994), that same court recognized that a compliance order issued under the Clean Air Act is "final agency action" and subject to immediate judicial review because the order required Allsteel either to stop construction of a new facility immediately or to violate the order and risk the imposition of harsh criminal or civil penalties. 38 Env't Rep. at 1698. The court further recognized that Allsteel faced a potential enforcement action for willful violation of the order itself, regardless of the validity of the underlying alleged violations, and that the mere existence of the order therefore exposed Allsteel to greater penalties than it would otherwise face in the absence of such an order.

Although the Sixth Circuit in *Allsteel* summarily cited the Opinion in this case and stated that "the panel concluded from the structure of the Clean Water Act that Congress intended to prohibit pre-enforcement judicial review of compliance orders issued under that Act," *id.* at 1697, there is a total absence of any supporting analysis for that conclusion. Clearly, the factors supporting federal court jurisdiction discussed in the *Allsteel* opinion are equally applicable to the issues raised in this case under the CWA. The primary issue in *Allsteel*, directly analogous to the issue in this case, was the purely legal issue of whether U.S. EPA had authority to issue a stop-work order when the federally-approved State agency already had authorized the work to proceed. *Id.* at 1699. The concurring view of Judge Wellford further highlights the constitutional infirmities of denying judicial review in the similar circumstances of this proceeding:

> I cannot believe that Congress intended that EPA have the unreviewable authority to close down indefinitely construction of a major plant which had not yet initiated any emissions without the opportunity for a full-scale hearing to determine whether the emission system, already approved by the state environmental agency, was in violation of applicable law and regulations.
>
> I note that over a period of months EPA has made no effort to institute an enforcement action against Allsteel. . . . Rather, EPA, content that it has effectively precluded manufacturing operations, has apparently sat back with its asserted position that Allsteel has no remedy in court. . . .
>
> Even if Congress were deemed to have intended in such a situation to preclude judicial review, I would be inclined to hold that unless EPA brought an enforcement action . . . within a reasonable time, the Clean Air Act may be unenforceable as violative of constitutional due process.
>
> *Id.* at 1699-1700.

The immediate effect of the compliance order issued in this case was precisely the same as the stop-work order in *Allsteel*. Having obtained the necessary approval for its emergency bypass from the federally-approved State agency, SOCCO then was ordered by federal agencies to stop the evacuation of water from its mine, with no feasible alternatives to avoid substantial – and irreparable – damage to its mine, equipment, and business itself. No enforcement action, in which the issues related to the validity of the bypass might have been addressed, was

ever commenced by the federal agencies involved.[7] The Sixth Circuit's conflicting decisions therefore raise a substantial issue regarding the constitutionality and validity of its interpretation of the enforcement provisions of the CWA in this case which requires review by this Court.

C. The Decision Of The Sixth Circuit Conflicts With This Court's Decision In *Leedom v. Kyne* By Denying Judicial Review Of An Action By The Office Of Surface Mining To Override The Proper Operation Of Ohio's Federally-Approved Permanent State Regulatory Program In Contravention Of The Surface Mining Control And Reclamation Act.

The Sixth Circuit's decision, if left undisturbed, will authorize OSM to duplicate enforcement actions taken by any approved State regulatory authority whenever OSM simply disagrees with the results of the SMCRA-mandated appeal incorporated in each State regulatory program. By its decision, the Sixth Circuit has obliterated the "primacy" jurisdiction committed by Congress to States which enact and adhere to State regulatory programs approved by the Secretary of the Interior.

As this Court held in *Leedom, supra,* federal court jurisdiction is available to a party aggrieved by agency action manifestly beyond the realm of its delegated authority if irremediable by the statutorily-prescribed method of review. Here, SOCCO proceeded to exhaust the mandatory administrative procedures available under

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[7] The Seventh Circuit similarly has confirmed that under the CWA, in appropriate circumstances, judicial review of pre-enforcement orders may be obtained. *Reuth v. U.S. EPA,* 13 F.3d 227, 231 (7th Cir. 1993) ["it is not inconceivable that the EPA or the Corps of Engineers might completely overextend their authority. In such a case, we suggest to those agencies that we will not hesitate to intervene in pre-enforcement activity. . . . "]

Ohio's federally-approved regulatory program, while also seeking declaratory and injunctive relief in the District Court on the basis that SMCRA did not authorize OSM, by means of any type of action, to override a temporary relief decision by a SMCRA-authorized appellate review board. Consistent with this Court's decision in *Leedom*, SOCCO was entitled to judicial review in this case because the "absence of jurisdiction of the federal courts" would mean "a sacrifice or obliteration of a right which Congress had created," namely, the right to expedited, effective temporary relief, absent which SOCCO's ability to recover and preserve its mine, equipment, and business was severely threatened. 358 U.S. at 190. OSM's infringement of SOCCO's statutory and constitutional rights to expeditious temporary relief from an immediate cessation order only would be exacerbated, rather than remedied, by forcing SOCCO to duplicate its exhaustion effort – creating a distinct possibility of obtaining irreconcilable results, and incurring further delays.

The Sixth Circuit's support for OSM's duplicate and attempted overriding enforcement action runs afoul of the Congressional commitment under SMCRA to transfer primary enforcement authority to the States. *See* 30 U.S.C. §§1201(f), 1202(g), 1253(a). Pursuant to that statutory scheme, once the Secretary of Interior approves a permanent State regulatory program, the Secretary is "no longer directly involved in local decision-making . . . [and] the state regulatory agency plays the major role with its greater manpower and its familiarity with local conditions." *In Re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 518, 523 (D.C. Cir., en banc) *cert. denied sub nom Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981). In this case, by issuing an immediate cessation order, Ohio's regulatory authority acted just as OSM would have – *if* OSM had been the proper enforcement authority in Ohio. With its action, the Ohio DOR acted to the fullest extent authorized by Congress for an enforcing authority,

whether operating under a federal or State permanent program. From that point forward, there was nothing left for OSM to enforce – the maximum enforcement action had taken place.

The Sixth Circuit rested its decision in support of OSM's claimed authority on SMCRA §521, 30 U.S.C. §1271, which describes the *limited* circumstances in which OSM maintains a *restricted* residue of enforcement authority within the context of a State's exclusive jurisdiction granted under SMCRA §503(a), 30 U.S.C. §1253(a). However, §1271(a) reflects only that Congress did not expect OSM to sit idly by, waiting for a State regulatory authority to take action in response to a threat of significant and imminent environmental harm. For this reason, the statute expressly waives the 10-day notification period in a case of imminent environmental harm or danger to the public *when a State has not acted.* In such a case of imminent harm, §1271(a)(2) supplements §1271(a)(1) by authorizing the immediate issuance of a cessation order *after* OSM conducts its own inspection.[8] As OSM has conceded in past rulemaking, §§1271(a)(1) and (a)(2) combine to provide this authority upon "proof that an imminent danger of significant environmental harm or danger to the public health or safety exists and the state has failed to take appropriate action." 53 *Fed. Reg.* 26729 (July 14, 1988). Consequently, contrary to the Sixth Circuit's view – but wholly consistent with the District Court's decision – §1271 allows OSM to take enforcement action in a primacy State such as Ohio *only* if the state has failed to take action even in those cases where OSM possesses

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[8] Although the Sixth Circuit stated that OSM conducted an inspection (Sixth Circuit Opinion, App. at p. 6a), the Record contradicts this finding. (Tr. II, p. 391; Tr. III, p. 115.) The plain language of 30 U.S.C. §1271(a)(2) requires, as a pre-condition to *any* OSM action, that there be a "Federal inspection."

"proof that an imminent danger of significant environmental harm exists."

If the Sixth Circuit's decision is left to stand, the primacy doctrine under SMCRA will be turned on its head. Acceptance of the Sixth Circuit's "stand-alone" interpretation of §1271(a)(2) would require an operator to prevail *twice* in duplicative proceedings of an appellate process specifically designed by Congress to provide expeditious relief. Such an absurd result is inconsistent with the plain language of SMCRA. Moreover, whether characterized as a readily observable usurpation of power not granted by Congress or a patent violation of the authority it was granted under SMCRA, OSM's disdain for both the primacy doctrine generally and the Ohio RBR's grant of temporary relief pursuant to the federal standards incorporated in Ohio's federally-approved regulatory program, plainly satisfies this Court's *Leedom* jurisdictional test. Thus, the Sixth Circuit clearly erred in denying federal court jurisdiction on this ground.

D. In Denying Judicial Review Of Southern Ohio Coal Company's Constitutional Claim Against The Office Of Surface Mining, The Sixth Circuit Misapplied The Decision Of This Court In *Hodel v. Virginia Surface Mining and Reclamation Ass'n* By Failing To Distinguish The Issue In *Hodel* From The Significantly Different Question Of Constitutional Due Process Which Has Not Been, But Should Be, Decided By This Court.

The Sixth Circuit's misapplication of this Court's decision in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), to the significantly different circumstances of State primacy, erroneously rejected another important constitutional basis for district court

jurisdiction in this case. Although the Sixth Circuit correctly recognized that federal court jurisdiction may lie "in cases of constitutional challenges to an agency's procedures," the court relied principally on *Hodel* to conclude that SOCCO failed to raise "a colorable constitutional claim." (Sixth Circuit Opinion, App. at pp. 15a-16a.) In so deciding, the Sixth Circuit established a standard for post-deprivation due process claims never envisioned by this Court in *Hodel*, which makes review of the appellate decision below imperative.

In *Hodel*, this Court examined the constitutionality of SMCRA's post-deprivation appellate procedure established for mine operators to seek relief from administrative orders that require the immediate cessation of coal mining operations. This Court balanced the governmental and private interests and concluded that SMCRA's post-deprivation hearing procedure constituted a lawful exception to the "normal rule that due process requires a hearing prior to deprivation of a property right." 452 U.S. at 300. Because "emergency situations" could justify an immediate cessation order prior to a hearing, this Court concluded that due process requirements could be satisfied by a post-deprivation hearing process that promised prompt and effective relief. 452 U.S. at 300-303.

SOCCO undertook precisely this appeal procedure after receiving an immediate cessation order from the Ohio DOR by proceeding before the Ohio RBR in accordance with the federally-approved process. Ohio, like many other States in the years since *Hodel*, was delegated permanent regulatory jurisdiction over coal mining operations within its borders through enactment of a program of State laws determined by the Secretary of the Interior to be no less effective than the federal permanent program of regulation applicable to States without an

approved State program.[9] As part of Ohio's federally-approved State program, the Ohio Legislature enacted counterparts identical to the federal standards for immediate cessation orders and expedited appellate review therefrom. *Compare*, 30 U.S.C. §1271(a)(2) *with* Ohio Revised Code §1513.02(D)(1); and 30 U.S.C. §1275(c) *with* Ohio Revised Code §1513.13(C). It is this federally-approved State program with which SOCCO is obligated to – and did – comply. And, it is this situation which presents the issue of whether this Court's decision in *Hodel* supports the Sixth Circuit's view that due process requirements are met even when a mine operator subject to a federally-approved State permanent regulatory program is forced to exhaust and prevail *twice* in the post-order appellate process established by Congress – at *both* the State and federal review levels – anytime OSM disagrees with a State appellate decision and attempts to nullify ongoing State review processes by issuing a duplicate cessation order.

SOCCO submits that the critical requirements of prompt and effective post-deprivation relief mandated by this Court in *Hodel* are ignored by the Sixth Circuit's decision. By disregarding the SMCRA-required temporary relief procedure incorporated in the federally-approved Ohio regulatory program and by requiring duplicative exhaustion of the identical procedure on the federal level, the Sixth Circuit impermissibly *doubled* the post-order hurdles for a mine operator seeking to exercise its right to expedited relief, and virtually insured that meaningful and effective review could not be obtained expeditiously.

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[9] As this Court observed in *Hodel*, any State which fails to develop and implement a federally-approved State regulatory program is subject to a federal permanent regulatory program enforced by OSM. 452 U.S. at 271-72.

Apparently unappreciated by the Sixth Circuit, Ohio's permanent regulatory program operated precisely as envisioned by Congress when enacting SMCRA. Ohio DOR carried out its enforcement responsibility under the State program to the maximum extent permitted by law when it issued an immediate cessation order against SOCCO's planned water release. With this action, the State regulatory authority acted to the fullest extent authorized by Congress for *any* enforcing authority, whether operating under a federal or State permanent program. And, following receipt of the cessation order from the State, SOCCO immediately applied for temporary relief under the federally-approved State procedure found at Ohio Revised Code §1513.13, which was the *only* federally-sanctioned review procedure available to SOCCO. SOCCO obtained the prompt post-deprivation relief hearing approved by Congress and this Court in *Hodel* as satisfying due process requirements. OSM then, instead of participating in the SMCRA-approved State appellate process, chose by administrative fiat to attempt to nullify the effect of the temporary relief order obtained by SOCCO from the Ohio RBR by forcing SOCCO into an identical temporary relief procedure, but before a different decisionmaker on the federal level.

In affirming what amounted to a veto by OSM of the entire State appellate procedure, the Sixth Circuit never considered the significance of SOCCO's exhaustion of the temporary relief procedure which Congress required for all federally-approved State permanent programs. The Sixth Circuit, contrary to all the provisions of SMCRA's statutory scheme, effectively has made OSM itself *the* appellate body for adjudicating temporary relief applications. Pursuant to the Secretary's approval of Ohio's program and consistent with SMCRA, the Ohio RBR is charged with this responsibility for Ohio's coal mining operations. *See* Ohio Revised Code §1513.13. Moreover, no provision of SMCRA authorizes OSM itself to override

the administrative appellate review power, even on the federal level when there is no federally-approved State permanent program.

In addition, to find federal jurisdiction based on a constitutional question, this Court need *not* decide whether OSM's or SOCCO's interpretation of SMCRA is correct. If SOCCO's interpretation is correct, OSM acted manifestly beyond its authority, and judicial review is proper. *See* Petition Section C, *supra*. On the other hand, even if this Court were to assume that SMCRA colorably authorizes the *double* exhaustion requirement advocated by OSM and condoned by the Sixth Circuit, then a substantial due process issue very different from that addressed by this Court in *Hodel* arises. This Court's analysis of due process and the temporary relief procedure in *Hodel* logically took for granted that a coal mine operator would have to successfully exhaust the temporary relief process only once – not twice – to obtain that vital remedy following an immediate cessation order in a particular case.

Moreover, while this Court concluded in *Hodel* that summary administrative action without a hearing may be justified "in emergency situations," no such "emergency" supported OSM's enforcement action here. Ohio's federally-approved regulatory authority already had issued a cessation order with which SOCCO had to comply. Rather, the only situation facing OSM was the fact that it disagreed with SOCCO prevailing in the federally-designated procedure for temporary relief incorporated in Ohio's federally-approved program. If it disagreed with that situation, OSM's remedy was to participate in the Ohio procedure which Congress had designated and the Secretary previously had approved. The constitutionally proper remedy certainly was not for OSM to usurp authority it had been denied by Congress and issue its own cessation order.

The efficacy of the relief procedure established by Congress and approved by this Court in *Hodel* as satisfying due process clearly contemplated a single temporary relief proceeding. Neither Congress nor this Court envisioned a duplicative system in which a mine operator must navigate and prevail twice on identical facts and under identical legal standards but before two different decisionmakers. If the Sixth Circuit's decision is left undisturbed, mine operators in States with permanent regulatory programs will be subject to the time and expense of exhausting dual mandatory temporary relief procedures leading to potentially conflicting – and thus, effectively meaningless – results absent successful duplication on the State and federal administrative review levels. This Court's decision in *Hodel* clearly does not support the constitutionality of such administrative double jeopardy.[10] The substantial question of constitutional

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[10] Ironically, OSM itself previously has recognized that a coal mine operator cannot properly be subjected to this type of double jeopardy. In rulemaking proceedings conducted in 1988, commentors had "argued that for OSM to override the relief granted the operator at the state level would completely undermine the relief provisions set forth in §525 of the Act and would subject an operator to double jeopardy by having to prevail at both the state and federal level." In response, OSM agreed that "a state regulatory authority has good cause for not taking action when it is enjoined from doing so by a state administrative or judicial body acting within the scope of its authority under the state program." 53 *Fed. Reg.* at 26739 (July 14, 1988). Consistent with this comment response, the rule which resulted from these rulemaking proceedings – and which remains in effect today – expressly recognizes that a State regulatory authority is not expected to correct a perceived violation where: "[t]he state regulatory authority is precluded by an administrative . . . order . . . from acting on the possible violation, . . . where the temporary relief standards of §525(c) of the Act have been met. . . . " 30 C.F.R. §842.11(b)(1)(ii)(B)(4)(iv).

due process implicated by OSM's effort to impose this unprecedented duplicative procedural obligation plainly gives rise to a constitutional claim sufficient to confer federal court jurisdiction.[11]

CONCLUSION

The Sixth Circuit's decision in this case is contrary to longstanding precedent in this Court, and decisions of other Courts of Appeals, and strands regulated entities in the midst of warring regulators. Denial of federal court jurisdiction under such circumstances allows federal agencies impermissibly to interrupt the State administration of federally-approved programs, deprives regulated entities of any meaningful due process, and imposes obligations on those regulated entities which have no statutory basis. The issues presented by this Petition are critical ones, not only to this litigation, but to similar cases pending in other courts and situations throughout

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[11] In addition to its misplaced reliance on *Hodel*, the only other reason the Sixth Circuit declined to find a "colorable constitutional claim" vesting the District Court with jurisdiction was its conclusion that any "taking" of SOCCO's property caused by the immediate cessation order could be remedied with compensation paid pursuant to the Tucker Act, 28 U.S.C. §1491(a)(1), citing *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 4-5 (1990). (Sixth Circuit Opinion, App. at p. 16a.) In so holding, the appellate court failed to address the preliminary, but critical, issue of whether SMCRA precludes Tucker Act remedies, *Preseault*, 494 U.S. at 12; and more significantly, that court ignored the irreparable harm which would befall not only SOCCO upon the loss of its business, but also SOCCO's employees, their families, and the entire economy of southeastern Ohio. The type of extraordinary irreparable harm threatened in this case underscores both the vital importance of federal court jurisdiction to enjoin unconstitutional agency action, and the need for this Court's review in this case.

the United States, and to the preservation of the substantial roles reserved by Congress under the CWA and SMCRA to the sovereign States. For all of these reasons, Southern Ohio Coal Company submits that its Petition for Writ Certiorari should be granted.

Respectfully submitted,

D. MICHAEL MILLER
(*Counsel of Record*)
ALVIN J. MCKENNA
MARK S. STEMM
JANET J. HENRY
ALAINE Y. MILLER
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215-6194
(614) 227-2000

Counsel for Petitioner, Southern Ohio Coal Company

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No. 93-3878

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOUTHERN OHIO COAL COMPANY, *Plaintiff-Appellee,*	)	
v.	)	ON APPEAL from the United States District Court for the Southern District of Ohio.
OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; RICHARD SEIBEL, Field Office Director, OSM; W. HORD TIPTON, Acting Director, OSM; CAROL BROWNER, EPA Administrator; and VALDAS V. ADAMKUS, EPA Administrator, Region V, *Defendants-Appellants.*	)	

Decided and Filed April 8, 1994

Before: KENNEDY and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge. In this appeal, we address two similar issues involving the jurisdiction of the District Court over the United States Environmental Protection Agency ("USEPA") and the Office of Surface Mining, Reclamation and Enforcement of the Department of the Interior ("OSM").[1] Both agencies took or threatened to take enforcement actions related to the flooding of an Ohio coal mine that were at odds with decisions of their respective state counterpart agencies, the Ohio Environmental Protection Agency ("OEPA") and the Ohio Division of Reclamation ("ODR"). The court enjoined the federal agencies from acting "to effect the cessation of pumping at [the mine] unless their respective parallel approved state agencies fail to act vigorously, expeditiously, and in accordance with law." Because we find that the court lacked jurisdiction to enjoin USEPA and OSM in this manner, we reverse the judgment of the District Court.

I.

A. Factual Background[2]

Plaintiff Southern Ohio Coal Company ("SOCCO") operates one of the country's largest underground coal

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[1] Richard Seibel, Field Office Director, OSM; W. Hord Tipton, Acting Director, OSM; Carol Browner, USEPA Administrator; and Valdas V. Adamkus, USEPA Administrator, Region V are also defendants in this action.

[2] We draw heavily from the facts as set forth by the District Court in its published opinion. *Southern Ohio Coal Co. v. Office of Surface Mining Reclamation & Enforcement, et al.*, 831 F. Supp. 1324, 1326-30 (S.D. Ohio 1993).

mines in Meigs County, Ohio. On July 11, 1993, SOCCO's Meigs Mine Number 31 ("Meigs 31") was inundated with water from an adjacent partially abandoned mine known as Raccoon Mine Number 3 ("Raccoon 3"). In 1989, what was formerly Meigs Mine Number 1 and a portion of Raccoon 3 were merged into what is now known as Meigs 31. When Meigs 31 was formed, part of Raccoon 3 was abandoned. A bulkhead was installed between the abandoned portion of Raccoon 3 and Meigs 31 to prevent naturally occurring water in Raccoon 3 from flooding into Meigs 31 and to permit pumping of naturally occurring water from Meigs 31 into Raccoon 3. At the time of the preliminary injunction, the cause of the flood had not been conclusively established and may or may not have been the failure of the bulkhead.

Under normal operations, the naturally occurring minewater, which is highly acidic, is neutralized with an alkaline agent before it is discharged into receiving waters. When wastewater is discharged into the waters of the United States, it must meet effluent limitations and other conditions established under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.*, commonly referred to as the Clean Water Act (the "CWA"). The CWA prohibits "the discharge of any pollutant by any person," except as permitted by the CWA. *Id.* § 1311(a). The primary regulatory mechanism employed to control discharges is a permitting system known as the National Pollutant and Discharge Elimination System ("NPDES"). A NPDES permit is required before a person may discharge pollutants into the navigable waters of the United States. The discharge must be in accordance with

the permit's conditions, which include effluent limitations. Under 33 U.S.C. § 1342(b), a state may administer the NPDES permit program within its borders if USEPA determines that the state program meets federal criteria set forth in the CWA and implementing regulations. USEPA approved and authorized the State of Ohio's NPDES program on March 11, 1974.

Meigs 31 naturally takes in and has the capacity to treat two to two and one-half million gallons of water per day. After the flood, an estimated one billion gallons of water filled Meigs 31. The floodwater contained levels of iron over 100 times the legal limit as well as excessive levels of zinc, manganese and copper. Ordinarily, the water would have to be treated before it could be discharged. The mine's existing treatment facilities, however, could not handle such a vast quantity of water within an acceptable time frame. SOCCO estimated that the floodwater would have to be evacuated within a period of two to four months because the water threatened the structural integrity of the mine; otherwise, Meigs 31 could no longer be mined safely. SOCCO operates only two mines, Meigs 31 and Meigs Mine Number 2 ("Meigs 2"). The viability of Meigs 2 depends to a great extent upon the continued operation of Meigs 31.

After reviewing and rejecting various proposals for the evacuation of the floodwater, SOCCO decided upon a plan that called for drilling new boreholes and installing new pumps and pumping untreated and minimally treated water into surrounding creeks and streams, which are tributaries of the Ohio River. SOCCO acknowledged that the discharge would kill all aquatic life, reduce pH

levels and increase sedimentation of iron, zinc, manganese and copper in the receiving waters. The proposed evacuation was not predicted to have a permanent effect on the environment; according to SOCCO's experts, the aquatic life that would be killed by the discharge would renew itself within two years. SOCCO also concluded that because the receiving waters were not used for human consumption prior to the proposed evacuation, the plan would not adversely affect human life.

SOCCO needed OEPA's approval to proceed with its plan, as it included discharges from unpermitted sources that exceeded the effluent limitations of SOCCO's NPDES permit. SOCCO's NPDES permit provides for emergency bypasses of permit conditions under certain situations. OEPA found that the situation at Meigs 31 warranted the requested bypass. On July 26, 1993, the Director of OEPA issued a written order, the "Director's Final Findings and Orders" ("DFFO"), authorizing the evacuation plan.

Before SOCCO could begin pumping, the ODR stepped in and prohibited SOCCO from commencing the plan. The ODR is the Ohio agency responsible for enforcing mining laws and regulations in the state and is the primary enforcer of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1201 *et seq.* The SMCRA was designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations. . . . " *Id.* § 1202(a). OSM, which was created by the SMCRA, has the responsibility of administering, approving, and overseeing the implementation of the SMCRA's programs. *Id.* § 1211. Any state that wishes to assume exclusive jurisdiction over implementing and enforcing the SMCRA,

may do so subject to federal approval and oversight. *Id.* § 1253(a). Ohio's regulatory program under the SMCRA was approved by the Secretary of the Interior on August 16, 1982.

ODR found that significant, imminent environmental harm or danger to public health or safety would result if SOCCO's discharge plan was implemented. On July 27, 1993, the Ohio Reclamation Board of Review (the "Board") granted temporary relief from ODR's order upon its finding that the plan posed no threat of imminent harm to the environment or the public. SOCCO again prepared to begin pumping. After its own inspection, OSM[3] entered the picture and issued a cessation order against SOCCO pursuant to 30 U.S.C. § 1271(a)(2). In contrast to the Board's conclusions, OSM found that a threat of significant imminent harm existed and that pumping should not commence.

B. Procedural Background

On July 29, 1993, SOCCO urgently sought a temporary restraining order ("TRO") against OSM:

> Immediate relief is requested because, while the ravaging effects of the mine flood continue, Defendants have blatantly and irrationally acted outside their jurisdictional authority by, without cause, ordering immediate cessation of water removal. This unlawful action comes at a time

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[3] OSM has the authority to conduct "such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs. . . . " 30 U.S.C. § 1267(a).

> when each passing hour of lost pumping time could mean the difference between saving and losing the mine, and ultimately, the entire complex. Shutdown of this Mine in SOCCO's two-mine complex seriously jeopardizes the economic viability of the entire complex. At stake are the jobs of 820 employees, over 4,900 mine-support and spin-off jobs and over One Hundred Million Dollars ($100,000,000.00) contributed annually by SOCCO and its employees to the local economies of the area.

SOCCO alleged that OSM was acting without authority because the state had primary enforcement authority under the SMCRA. The court granted the TRO the next day, finding that since OSM had approved the state program, including the procedure of Board review of ODR decisions, OSM was required to defer to the state's actions so long as the actions were in accordance with approved procedures. The order declared OSM's cessation order a nullity and restrained OSM from acting in any manner to stop or interfere with implementation of the water-removal plan as long as the state program was being administered in accordance with law.

SOCCO began pumping pursuant to the plan on July 30, 1993. On August 3, USEPA informed SOCCO that unless it voluntarily ceased pumping so that USEPA could investigate alleged violations of the CWA, USEPA was prepared to issue an order under 33 U.S.C. § 1319 to prevent further pumping. On Auguest 4, SOCCO made a motion to join USEPA and two of the agency's officials as defendants in this matter. SOCCO sought and obtained a TRO restraining USEPA from:

(1) issuing an administrative order against Southern Ohio Coal Company's water removal plan for Meigs Mine No. 31; and
(2) taking any other action aimed to stop, interfere with or delay Southern Ohio Coal company's implementation of its water removal plan for Meigs Mine No. 31.

SOCCO also filed a motion for preliminary and permanent injunctive relief against OSM and USEPA.

On August 6, 1993, USEPA moved to vacate the TRO on the grounds that (1) the District Court lacks jurisdiction under the CWA to review administrative orders and thus plainly lacks jurisdiction to enjoin the issuance of orders or the taking of other actions associated with enforcement of the CWA, and (2) SOCCO failed to demonstrate a likelihood of success or a likelihood of irreparable harm in absence of the TRO. On August 19, the court denied USEPA's motion to vacate and granted SOCCO's motion for preliminary injunctive relief. *Southern Ohio Coal Co. v. Office of Surface Mining Reclamation & Enforcement, et al.*, 831 F. Supp. 1324 (S.D. Ohio 1993) (*"SOCCO II"*).[4] Defendants timely appealed.

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[4] Defendants moved for a stay of the preliminary injunction, which this Court granted in part on August 30, 1993. We ordered the injunction stayed to permit "the USEPA to investigate and make findings with respect to any alleged violation of the Clean Water Act, and thereafter to act in accordance with its statutory authority pursuant to 33 U.S.C. § 1319 if it finds that a violation has occurred." On September 3, 1993, USEPA, Region V, formally found a violation at Meigs 31 and issued a cessation order. Negotiations between the parties failed and SOCCO filed a motion for "an order requiring defendants U.S. EPA, Carol

II. OSM

A. Exhaustion Requirement

The District Court addressed the issue of whether it had jurisdiction to issue the temporary restraining order and preliminary injunction against OSM in its order granting the first TRO against OSM. *Southern Ohio Coal Co. v. Office of Surface Mining Reclamation & Enforcement, et al.*, 831 F. Supp. 1322, 1324 (S.D. Ohio 1993) ("*SOCCO I*"). It found that because "there is a substantial likelihood that [SOCCO] will prevail on the merits and that the relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources" it had jurisdiction under 30 U.S.C. § 1276. Section 1276 provides for judicial review of the Secretary's decisions by United States District Courts. The court did not believe that the exhaustion of administrative remedies was required before jurisdiction under this section becomes available. We disagree as the District Court's interpretation of the statute is directly contrary to

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Browner and Valdas Adamkus to show cause why they are acting contrary to [the District Court's] order and for an order nullifying U.S. EPA's cessation order." On September 22, 1993, the District Court granted SOCCO's show cause motion, nullified USEPA's cessation order and enjoined the United States from filing an enforcement action. USEPA then filed a "motion for clarification of partial stay pending appeal, for vacation of inconsistent court orders and for stay of contempt proceedings pending appeal" with this Court. We granted USEPA's motion on September 23, 1993, finding that the District Court is without jurisdiction to review USEPA's compliance order prior to the initiation of a civil enforcement action. *See Southern Pines Assocs. v. United States*, 912 F.2d 713, 716-17 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990).

this Court's decision in *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083 (6th Cir. 1981).

In *Shawnee Coal*, the lower court enjoined the Secretary of the Interior from enforcing cessation orders against the Shawnee Coal company, which had been issued pursuant to 30 U.S.C. §§ 1271(a)(3) and 1272(e)(4), basing its jurisdiction on section 1276. We reversed, holding that the lower court lacked jurisdiction because the coal company had failed to exhaust the administrative remedies provided in 30 U.S.C. § 1275 before seeking judicial review under section 1276. *Id.* at 1092. The *Shawnee Coal* case is controlling here.

Quoting from the Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 298-99 (1981), we set forth the relationship between administrative action and judicial review under the SMCRA:

> A mine operator aggrieved by an immediate cessation order issued under § 521(a)(2)[, 30 U.S.C. § 1271(a)(2),] or by a cessation order issued after a notice of violation and expiration of an abatement period under § 521(a)(3)[, 30 U.S.C. § 1271(a)(3),] may immediately request temporary relief from the Secretary, and the Secretary must respond to the request within 5 days of its receipt. § 525(c), 30 U.S.C. § 12[75]. Section 526(c) of the Act, 30 U.S.C. § 1276(c), authorizes judicial review of a decision by the Secretary denying temporary relief. In addition, cessation orders are subject to informal administrative review under § 521(a)(5), [30 U.S.C. § 1271(a)(5),] and formal administrative review, including an adjudicatory hearing, under

> § 525(b), 30 U.S.C. § 1275(b). The Secretary's decision in the formal review proceeding is subject to judicial review pursuant to § 526(a)(2), 30 U.S.C. § 1276(a).

Shawnee Coal, 661 F.2d at 1091.

Further,

> [section] 526(c) authorizes judicial review when the Secretary *has issued* an order or decision denying temporary relief from a cessation order issued under § 521(a)(2), (3) or (4), 30 U.S.C. § 1271(a)(2), (3), or (4). *It is not*, as Shawnee contends, *an independent jurisdictional grant permitting intervention by a federal court prior to a party's resort to the administrative process.* Rather, *the statute's authorization of judicial review is inextricably intertwined with the administrative review procedures of § 525(c), 30 U.S.C. § 1275(c).*
>
> . . . .
>
> The ready availability of adequate administrative relief also dictates that an aggrieved party exhaust its administrative remedies before procuring judicial review. *Seepe v. Department of the Navy*, 518 F.2d 760, 762 (6th Cir. 1975).

Id. at 1091-92 (emphasis added). SOCCO did not avail itself of the administrative relief provided by section 1275(c). We must therefore find that there is no basis for jurisdiction under section 1276(c).

SOCCO attempts to distinguish *Shawnee Coal* on the grounds that the case was decided before a permanent regulatory program had been approved in the State of Ohio. Under the SMCRA, Congress delineated a two-tiered regulatory program consisting of an interim phase

and a permanent phase. Because *Shawnee Coal* was decided during the interim phase, SOCCO argues that it has no application here where Ohio has entered the permanent phase. There is, however, no indication in the statute that sections 1275 and 1276 apply only during the interim phase. Moreover, as Congress most assuredly contemplated eventual permanent programs in all states, whether state or federally controlled, we hold that these provisions apply to permanent programs.

B. Exceptions To The Exhaustion Requirement

SOCCO next contends that OSM had no authority to issue a cessation order under section 1271(a)(2) and that the court therefore had jurisdiction to enjoin such unlawful agency action under *Leedom v. Kyne*, 358 U.S. 184 (1958). In *Leedom*, the Supreme Court established the principle that the exhaustion requirement may be waived where an agency acts "in excess of its delegated powers and contrary to a specific [statutory] prohibition." *Leedom*, 358 U.S. at 188. Before a federal court may step in, the aggrieved party must also establish that the " 'absence of jurisdiction of the federal courts' " would mean " 'a sacrifice or obliteration of a right which Congress' had created." *Id.* at 190 (quoting *Switchmen's Union of North American v. National Mediation Bd.*, 320 U.S. 297, 300 (1943)).

We have observed that the *Leedom* exception to the exhaustion of administrative remedies doctrine "is a narrow anomaly reserved for extreme situations. Thus, even when the issue of agency jurisdiction is raised, the exhaustion doctrine generally requires that an agency be

accorded an opportunity to determine initially whether it has jurisdiction." *Shawnee Coal*, 661 F.2d at 1093 (citation omitted). Before the *Leedom* exception can be invoked, an agency's action must be manifestly beyond the realm of its delegated authority. Because we conclude that OSM was not only acting within the realm of its authority, but was required to act as it did, we do not reach the other criteria we have used to determine whether the exhaustion requirement should be waived.[5]

The District Court held that OSM had no authority to act under section 1271(a)(2), where "the approved state agency has . . . already assumed jurisdiction . . . , so long as that state agency is acting appropriately." *SOCCO I*, 831 F. Supp. at 1323.[6] The court found that this "state primacy" requirement, which allegedly arises from section 1201(f)[7], exists in states where there is a federally-approved state program in place.

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[5] If the first element is satisfied, we then ask "2) will the agency's expertise assist in resolving the jurisdictional issue; and 3) will exhaustion of administrative remedies result in irreparable harm to the claimant." *Shawnee Coal*, 661 F.2d at 1093.

[6] The court also held that OSM cannot act under section 1271(a)(1) for the same reason.

[7] The Congress finds and declares that –

. . . .

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States[.]

30 U.S.C. § 1201(f).

There is nothing in the SMCRA placing such a limitation upon OSM's authority. Indeed, under section 1271(a)(2), OSM is *obligated* to issue a cessation order, and take further action if necessary, where a mine poses "an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. . . . " States that desire exclusive jurisdiction over the regulation of coal mining and reclamation operations may acquire it as provided in section 1253(a), *subject however to sections 1271* and 1273. The fact that a mine is located in a primacy state is irrelevant to OSM's duties under section 1271. As OSM's actions were not only within its delegated statutory authority, but were mandated by section 1271(a)(2), the standards of the *Leedom* exception have not been met.

We have recognized several other exceptions to the exhaustion of administrative remedies doctrine:

> Where pursuit of administrative remedies does not serve the purposes behind the exhaustion doctrine, the courts have allowed a number of exceptions. Thus, exhaustion is not required if administrative remedies are inadequate or not efficacious; where pursuit of administrative remedies would be a futile gesture; where irreparable injury will result unless immediate judicial review is permitted; or where the administrative proceeding would be void.

Shawnee Coal, 661 F.2d at 1093 (citations omitted).

SOCCO alleges that the pursuit of administrative remedies would have been inadequate, futile and would have resulted in irreparable injury, and that, therefore,

the exhaustion requirement was properly waived. First, SOCCO asserts that the promise of expedited relief under section 1275(c) has "proven wholly illusory" because "significant delays in adjudicating temporary relief applications on the federal level have proven to be the rule rather than the exception. . . . " SOCCO cites four Interior Board of Land Appeals ("IBLA") decisions[8] as authority for its allegations. Defendants assert that these decisions do not support SOCCO's position because one decision did not involve the five-day decision requirement and the complainants waived their right to a five-day decision in the other three decisions. SOCCO next summarily alleges that had it engaged the administrative appeal process the delay involved would have resulted in irreparable harm to the mine. It was projected that the emptying of the mine would require from thirty to sixty days of pumping. SOCCO has pointed to no evidence that an additional five days of delay would have meant the ruin of the mine. We find that SOCCO has failed to make a satisfactory showing of inadequacy, futility or irreparable injury. *Cf. Davis v. Keohane,* 835 F.2d 1147, 1148-49 (6th Cir. 1987).

SOCCO also asserts that the District Court had jurisdiction over the dispute because of the constitutional issues it raised. We have stated that exhaustion of administrative remedies may not be required in cases of constitutional challenges to an agency's procedures. *Southern*

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[8] *Mary Herald v. OSM,* 123 IBLA 334 (1992) (5-1/2 months); *Coal Energy, Inc. v. OSM,* 119 IBLA 111 (1991) (3-1/2 months); *Muskingum Mining Co. v. OSM,* 113 IBLA 352 (1990) (over 5 months); and *Valley Camp Coal Co. v. OSM,* 112 IBLA 19 (1989) (4 years).

Ohio Coal Co. v. Donovan, 774 F.2d 693, 702 (6th Cir. 1985), *amended by*, 781 F.2d 57 (6th Cir. 1986). In the Fifth Circuit, "an 'assertion of [a] constitutional right . . . not transparently frivolous . . . [gives] the District Court jurisdiction' to hear an attack on an interlocutory agency order." *Coca-Cola Co. v. Federal Trade Comm'n*, 475 F.2d 299, 303 (5th Cir.) (quoting *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949)), *cert. denied*, 414 U.S. 877 (1973).

In the present case, SOCCO has not alleged a colorable constitutional claim. In its complaint, it asserted that OSM's actions "deprived [SOCCO] of its property without due process of law in violation of the Fifth Amendment of the United States Constitution." First, the Supreme Court has already upheld the Act's administrative review procedures in a facial due process challenge. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-303 (1981). As in the present case, *Hodel* involved an immediate cessation order issued under section 1271(a)(2). The requirement that the Secretary respond to a request for temporary relief from the order within five days, 30 U.S.C. § 1275(c), and the provision for subsequent judicial review, *Id.* § 1276(c), satisfied the Court that "the Act's immediate cessation order provisions comport with the requirements of due process." *Id.* at 303. Second, if SOCCO made a claim under the Takings Clause of the Fifth Amendment and if the immediate cessation order "gives rise to a taking, compensation is available to [SOCCO] under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the requirements of the Fifth Amendment are satisfied." *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 4-5 (1990).

SOCCO lastly argues that the court had jurisdiction under *Darby v. Cisneros*, 113 S. Ct. 2539 (1993), which held that where neither the relevant statute nor regulations require exhaustion of administrative remedies prior to seeking judicial review, federal courts cannot impose an exhaustion requirement as a prerequisite to review under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq. Darby* is inapposite to this case because the SMCRA unambiguously requires resort to the prescribed administrative review process before seeking judicial review. The Court noted that in cases such as this that are not governed by the APA,

> appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.

Darby, 113 S. Ct. at 2548 (quoting *McCarthy v. Madigan*, 112 S. Ct. 1081, 1086 (1992)).

Given that SOCCO has failed to exhaust its administrative remedies and that no exception to the exhaustion doctrine applies, we hold that the District Court erred in exercising jurisdiction over OSM under section 1276(c). We further hold that the court did not otherwise have jurisdiction to enjoin enforcement of the OSM cessation order.

III. USEPA

It is important to bear in mind what issue is before this Court respecting the District Court's act of enjoining

USEPA. We must answer whether the District Court had jurisdiction to enjoin USEPA from issuing an administrative order or taking any other action towards stopping the pumping at Meigs 31. The issue is not whether USEPA has "override" authority over OEPA's decision to grant SOCCO a bypass pursuant to the bypass provisions in SOCCO's NPDES permit. Neither is the propriety of the bypass decision before us. SOCCO remains free to raise the OEPA-approved bypass as an affirmative defense to any future enforcement action USEPA may bring. The issue before us centers on the power of a district court to review pre-enforcement action of USEPA.

Both the Fourth and Seventh Circuits have held that district courts lack jurisdiction to review compliance orders prior to the commencement of enforcement proceedings. *Southern Pines Assocs. v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990); *Hoffman Group Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). USEPA must either issue a compliance order or institute a civil action upon notice of a violation[9]. 33 U.S.C. § 1319(a)(1), (3). In both *Southern Pines* and *Hoffman Group*, the courts concluded that Congress intended to preclude judicial review of compliance orders prior to the initiation of a civil action. This conclusion was based on their interpretation of the legislative history and the structure of the CWA.

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[9] USEPA may also choose to first notify the state of the violation. If the state fails to take enforcement action within thirty days of the notification, "the Administrator shall issue [a compliance order] or shall bring a civil action. . . ." 33 U.S.C. § 1319(a)(1).

The enforcement provisions of the CWA were modeled after the enforcement provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq. Southern Pines*, 912 F.2d at 716 (citing S.Rep. No. 92-414, 92d Cong., 1st Sess. 63 (1971), reprinted in, 1972 U S.Code Cong. & Admin. News pp. 3668, 3730). A review of the caselaw under the CAA reveals the uniform holding that judicial review of pre-enforcement orders, similar to those issued under the CWA, is not available. *Id.* (citing *Union Elec. Co. v. EPA*, 593 F.2d 299, 304 (8th Cir.), *cert. denied*, 444 U.S. 839 (1979); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977)). The same is true of pre-enforcement action under CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq. Id.* (citing *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir. 1986); *Wheaton Indus. v. EPA*, 781 F.2d 354, 356-57 (3d Cir. 1986); *United States v. Outboard Marine Corp.*, 789 F.2d 497, 505-06 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *Barnes v. United States District Court*, 800 F.2d 822 (9th Cir. 1986); *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264-65 (6th Cir. 1985)).[10] After reviewing these statutes, the Fourth Circuit concluded: "The structure of these environmental statutes indicates that Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation." *Southern Pines*, 912 F.2d at 716.

In contrast to the preclusion of review of compliance orders, the CWA explicitly provides for judicial review of

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[10] Since 1986, CERCLA has included a provision specifically precluding judicial review of pre-enforcement action. 42 U.S.C. § 9613(h).

the assessment of administrative penalties by USEPA. 33 U.S.C. § 1319(g)(8). The Seventh Circuit believed that this express provision for judicial review, in combination with the absence of a parallel provision for review of compliance orders, was further support for its holding.

> In drafting the Clean Water Act, Congress chose to make assessed administrative penalties subject to review while at the same time it chose not to make a compliance order judicially reviewable unless the EPA decides to bring a civil suit to enforce it. . . . Having provided a detailed mechanism for judicial consideration of a compliance order via an enforcement proceeding, Congress has impliedly precluded judicial review of a compliance order except in an enforcement proceeding.

Hoffman Group, 902 F.2d at 569.

Congress provided one forum in which to address all issues, including constitutional challenges, raised by the issuance of a compliance order: an enforcement proceeding. "And, since the enforcement proceeding is the only forum for enjoining violations of the Act, [an alleged violator] cannot be compelled to comply with the Compliance Order without an opportunity to challenge the Order's validity in court." *Id.* The potential liability of an alleged violator is not affected by the holding that no pre-enforcement judicial review of compliance orders is available. USEPA may bring an enforcement action without first issuing a compliance order. In an enforcement action, a court may issue an injunction or impose civil penalties of up to $25,000 per day for each violation of the Act, a permit or a compliance order. 33 U.S.C. §§ 1319(b), 1319(d). A violator is subject to the same injunctive

orders and penalties whether or not USEPA issues a compliance order.

Today we join the Fourth and Seventh Circuits in holding that district courts are without jurisdiction to review pre-enforcement compliance orders issued under the CWA. This holding applies not only to orders issued once a violation is discovered, but also to the investigatory work necessary to determine whether a violation exists. Here, therefore, the District Court lacked jurisdiction to enjoin USEPA from investigating the situation at Meigs 31. As the court itself acknowledged, "[u]ndoubtedly, the CWA vests in USEPA the authority to perform an investigation." *SOCCO II*, 831 F. Supp. at 1335. The court was likewise without jurisdiction to enjoin the *issuance* of an order given that it is without jurisdiction to review a compliance order.

SOCCO argues that they are not challenging pre-enforcement action, but instead are challenging the authority of USEPA to act at all under the circumstances of this case. This argument was made and rejected in *Southern Pines* and in a recent Seventh Circuit decision in the *Hoffman Group* line, *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993). Both courts were unpersuaded, as are we, that a jurisdictional challenge to the agency's issuance of an order is distinguishable from challenges to the order itself, which, as we have just held, can only be had in an enforcement proceeding. Both challenges interfere with USEPA's ability to quickly respond to the environmental problems and both may be dealt with in an enforcement action. The *Rueth* court acknowledged that "it is not inconceivable that the EPA . . . might completely overextend [its] authority. In such a case, [the court would] not

hesitate to intervene in pre-enforcement activity, but this is not the case. . . . " *Rueth*, 13 F.3d at ___. The District Court believed that the instant actions of USEPA presented such a case. We disagree.

First, in light of our holding that the CWA clearly precluded judicial review of pre-enforcement action, the District Court's reliance upon *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Darby v. Cisneros*, 113 S. Ct. 2539 (1993), for its exercise of jurisdiction is misplaced. The court also discussed the recognized jurisdiction of federal courts to enjoin unauthorized agency action under the *Leedom* doctrine and then faulted USEPA for failing to direct the court "to a single case holding that this Court does not have jurisdiction to consider whether a federal agency's action or threatened action is beyond its jurisdiction." *SOCCO II*, 831 F.Supp. at 1332. What the court fails to appreciate is that the *Leedom* doctrine may only be invoked under severely limited circumstances. As defendants state, the court seemed to be operating under the assumption that "the mere assertion of a challenge to agency jurisdiction sufficed to invoke the court's jurisdiction under *Leedom*." This assumption is wrong. As discussed above, *Leedom* is implicated only when an agency's action (or threatened action) is manifestly outside of its delineated authority.

Here, USEPA's threatened action comes nowhere close to the unauthorized action contemplated by *Leedom* and its progeny. The CWA's structure bears striking similarities to that of the SMCRA. Like the SMCRA, the CWA sets up a system of "cooperative federalism," in which states may choose to be primarily responsible for running federally-approved programs. 33 U.S.C. § 1342. USEPA

approved Ohio's NPDES permitting system including its bypass provision; Ohio is thus a primacy state. Because a state may adopt permit conditions more stringent than federally required, 33 U.S.C. § 1370(1), it may choose to not include a bypass provision in a permit. Where it does include a bypass provision, such provision must meet the standards set forth in 40 C.F.R. § 122.41(m). Contrary to the District Court's interpretation of the CWA's regulatory scheme, USEPA retains independent enforcement authority in primacy states, 33 U.S.C. § 1342(i), as does OSM under the SMCRA. Nothing in regulation 122.41(m) changes this residual authority in the area of bypass decisions made by state regulators in primacy states. Under both the CWA and the SMCRA, the responsible federal agency retains oversight power to ensure compliance with federal standards. As we discussed above, whenever USEPA learns that a person is in violation of the CWA or a NPDES permit, it must either issue a compliance order or bring a civil enforcement action seeking appropriate relief. 33 U.S.C. § 1319(a). The District Court reasoned that because USEPA had not found a violation of the CWA, it was not *required* to act under section 1319. It then analyzed whether USEPA had any authority to act outside of section 1319. The court seems to be saying that while USEPA has jurisdiction to enjoin or sanction violations of the CWA, it has no investigatory authority to determine whether a violation has occurred in the first instance. We find that the grant of enforcement authority in section 1319 presupposes the authority to investigate alleged violations of the CWA. USEPA's threatened action was supported by statutory authority.

We therefore hold that the District Court erred in finding it had jurisdiction under the *Leedom* doctrine.

IV.

Accordingly, the judgment of the District Court enjoined the actions and threatened actions of OSM and USEPA is **REVERSED** and the case is **REMANDED** with instructions to dismiss for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Southern Ohio Coal Company,	)	
Plaintiff,	)	Case No.
	)	C2-93-751
vs.	)	
Office of Surface Mining Reclamation and Enforcement, Department of the Interior, et al.,	)	
Defendants.	)	

PRELIMINARY INJUNCTION ORDER

(Filed Aug. 19, 1993)

This matter is currently before the Court for consideration of the motion of the United States Environmental Protection Agency (hereinafter referred to as "USEPA") to vacate this Court's August 4, 1993 Order temporarily restraining USEPA from acting in any manner with regard to the flooding at Plaintiff's Meigs Mine Number 31 (hereinafter referred to as "Meigs 31") in Meigs County, Ohio. In this Order, the Court also addresses Plaintiff's motion for an order preliminarily enjoining USEPA and the Office of Surface Mining Reclamation and Enforcement, Department of the Interior (hereinafter referred to as "OSM") from acting to cause a cessation or delay of the evacuation of water from Meigs 31, unless the Ohio agencies approved to enforce the applicable federal and state statutes fail to act as charged by these statutes.

BACKGROUND

Prior to July 11, 1993, Plaintiff ceased mining operations in its Raccoon Mine Number 3 (hereinafter referred to as "Raccoon 3"). Raccoon 3 is adjacent to Meigs 31 and is at a higher underground elevation than Meigs 31. In order to prevent naturally occurring water in Raccoon 3 from flooding into Meigs 31 through the opening that connects the two mines and in order to permit pumping of such naturally occurring water from Meigs 31 into Raccoon 3, Plaintiff constructed a bulkhead between the two mines. That bulkhead was designed to completely seal the opening between the two mines, except to permit pumping water from Meigs 31 to Raccoon 3. Plaintiff caused the bulkhead to be designed to a strength of ten times the maximum pressure created by the water in Raccoon 3 at the opening between the two mines.

On July 11, 1993, Meigs 31 was inundated with an estimated one billion gallons of water from Raccoon 3. As of August 12, 1993, the cause of the inundation had not been conclusively established and may or may not have been a failure of the bulkhead. Because the water from Raccoon 3 occupied approximately thirty to fifty percent of Meigs 31, Plaintiff immediately began investigating alternatives for evacuating Meigs 31.

Plaintiff's alternatives for evacuating Meigs 31 were limited by three primary factors. The first factor complicating evacuation was that the normal method of evacuating water from Meigs 31 was through the bulkhead into Raccoon 3. Because the structural integrity of the bulkhead could not be ascertained, Plaintiff could not rely

upon the bulkhead or Raccoon 3 as a repository for water evacuation. The second complicating factor was the volume of water occupying Meigs 31. As of July 11, 1993, Plaintiff did not have a method for evacuating more than a few million gallons of water per day from Meigs 31. Accordingly, new methods were required for the evacuation. Finally, the chemical constitution of the water raised environmental concerns related to the evacuation.

The water occupying Meigs 31 contained higher levels of iron, manganese, copper, and zinc as well as a lower PH than normally occurs in the natural waterways in the area around Meigs 31. The level of those elements and the lower PH would, in normal conditions and pursuant to applicable state and federal laws and regulations, make treatment of the water necessary before it could be released into local streams. Because of the volume of the water, however, treatment of all of the water by Plaintiff's existing treatment facilities was not practicable.

Of course, treatment by the existing facilities was possible; however, due to the volume, such a process would have consumed a great deal of time. The mine naturally makes two to two and one-half million gallons of water per day. Therefore, the rate at which the mine naturally makes water would have prevented any genuine progress against the unanticipated volume of the flood. Essentially, the volume of water which plaintiff was equipped to treat was equal to the normally generated amount of mine seepage. Time became an enemy of Plaintiff, because Plaintiff's analysis indicated that unless the water could be evacuated within, at most, a period of two to four months, Meigs 31 could no longer be mined

safely. The basis for that conclusion was that the water threatened the structural integrity of the mine. In time, the roof and wall supports within the mine would deteriorate to a point where safety within the mine could not be ensured. Furthermore, methane naturally develops within the mine, and Plaintiff's ability to evacuate methane from Meigs 31 was eliminated by the inundation on July 11, 1993. Until the water could be evacuated, Plaintiff would be unable to evacuate methane from Meigs 31 and it would build to levels that are incompatible with human occupation of the mine. After a certain amount of time, Plaintiff had good cause to believe that it would no longer be able to make the mine safe for workers who would enter the mine.

Plaintiff operates only two mines, Meigs 31 and the adjacent Meigs Mine Number 2 (hereinafter referred to as "Meigs 2"). The viability of Meigs 2 depends to a great extent upon the continued operation of Meigs 31. Accordingly, Plaintiff's entire operation in Meigs County, one of the largest in the United States, was threatened by the water occupying Meigs 31.

After investigating several alternatives with private consultants, plaintiff settled upon an evacuation method that included the drilling of bore holes at various locations and the evacuation of water, without normal treatment precautions, into streams that feed into the Ohio River. Plaintiff determined that the effects of such an evacuation would include a total or nearly total kill of aquatic life in the relevant streams, a reduction in PH and some increase in sedimentation of iron, zinc, copper, and manganese in these streams and perhaps the Ohio River.

Plaintiff concluded that the proposed evacuation plan would have no permanent effects on the environment, because the only affected life would renew itself within one to two years. Further, Plaintiff concluded, based upon the fact that the water in the relevant waterways prior to the proposed evacuation was not potable and upon Plaintiff's investigation into existing uses of the water in the streams, that human life would not be affected. Plaintiff recognized that some livestock might drink water from the relevant streams and offered to take any necessary precautions, at Plaintiff's expense, to prevent damage to such livestock. Further, Plaintiff offered to provide water to any other person who claimed to use water from the relevant streams for other purposes.

Plaintiff proposed numerous safeguards against permanent ecological damage. Plaintiff proposed to pump water from its treatment facility, after the evacuation of Meigs 31, at a higher than normal rate, in an attempt to force sediment downstream to and through the Ohio River. Plaintiff caused chemical analysis to be performed of the natural rate of sedimentation, comparison of the rate of natural sedimentation versus that resulting from the proposed evacuation, and the possible effects of such sedimentation. Plaintiff concluded that the long-term effects of the evacuation would be minimal.

Plaintiff had rejected other alternatives for evacuation prior to settling on the method for evacuation that it proposed. Plaintiff rejected all methods that depended upon expanding existing treatment facilities for three reasons. The first such reason was that Plaintiff had already sought approval for expansion from the appropriate governing bodies and, after waiting for as much as three

years, had not received such approval. Second, Plaintiff's investigation resulted in the conclusion that existing facilities could not be expanded to treat more than approximately 23 percent of the water in Meigs 31. Finally, Plaintiff concluded that the necessary expansions would require at least several months, a delay that would almost certainly render the mine unworkable.

Plaintiff also rejected *in situ* treatment of the water. *In situ* treatment would have involved the addition of caustic substances to the water in Meigs 31 in order to cause a fallout of the offending elements in the water. *In situ* treatment would, of course, create a sediment that would be left in Meigs 31 after evacuation of the water thus treated. Plaintiff estimated that the amount of sediment (also referred to as "residue" or "sludge") left behind to be 75 to one hundred million gallons. The primary disadvantage to *in situ* treatment was the evacuation and placement of that sediment. Plaintiff's existing facilities would not have accommodated that volume of residue. Further, Plaintiff could not practicably create additional storage facilities for the sludge in compliance with existing approval from governing bodies. Accordingly, Plaintiff rejected the *in situ* treatment alternative.

After rejecting, for various reasons, all alternatives, Plaintiff settled upon the evacuation plan that was eventually proposed. Plaintiff's primary consideration in that choice was time. Plaintiff recognized that other alternatives might eventually lead to the complete evacuation of the mine. However, because Plaintiff's goal was to make the mine workable again, none of the rejected alternatives was deemed viable.

Consistent with the provisions of its NPDES permit, issued by the Ohio Environmental Protection Agency (hereinafter referred to as "OEPA"), Plaintiff sought approval of its emergency bypass plan from OEPA. The proposed plan was an emergency bypass plan in that, pursuant to the plan, Plaintiff sought to bypass its normally used treatment facilities. Plaintiff's NPDES permit provided for emergency bypass in certain situations, and OEPA found that the existing situation warranted emergency bypass. OEPA approved the proposed plan. Specifically, the Director of OEPA concluded that Plaintiff's plan to pump Meigs 31 was permissible under Plaintiff's NPDES permit. On July 26, 1993, the Director of OEPA issued Findings and an Order authorizing the plan.

Before Plaintiff began pumping, however, the Ohio Division of Reclamation issued an order prohibiting Plaintiff from commencing pumping. The Ohio Division of Reclamation is the state agency charged with enforcing mining laws and regulations in Ohio and is approved by OSM as the primary enforcement body for federal mining and reclamation laws. On July 27, 1993, upon reviewing the Ohio Division of Reclamation's order, the Ohio Reclamation Board of Review granted temporary relief from that order. The Board of Review found that Plaintiff had demonstrated a substantial likelihood of success on the merits and that no significant imminent environmental harm or danger to public health or safety would result from the discharge. As a result of the temporary relief granted by the Ohio Reclamation Board of Review, Plaintiff again prepared to commence pumping.

Before pumping began, OSM issued a cessation order, which had the effect of setting aside the findings of

the Ohio Reclamation Board of Review concerning likelihood of harm. Based upon the same evidence that was before the Ohio Reclamation Board of Review, OSM concluded that a threat of significant imminent harm existed and that pumping should not commence.

On July 29, 1993, Plaintiff commenced this action, seeking an order temporarily restraining OSM from duplicating the administrative process previously commenced in the approved Ohio agencies. On July 30, 1993, this Court conducted a hearing on that motion. At the conclusion of the arguments of the parties on that date, this Court issued the requested order. The Court found that OSM had acted without jurisdiction. The basis of this Court's issuance of the July 30, 1993 Order was that OSM was required by the applicable federal law and regulations to consider for approval state agencies to be primary enforcers of federal mining laws and regulations and, where appropriate, to approve those agencies. OSM had considered and approved the Ohio Division of Reclamation as the primary enforcement body in Ohio. Having approved the state agency, OSM was required by law to defer to that agency in any situation where that agency was acting in accordance with prescribed procedure.

At the July 30, 1993 hearing, OSM had argued against the issuance of a temporary restraining order. OSM based its arguments solely on 30 U.S.C. §1271(a)(1), which allows OSM to act in an emergency situation, even when a parallel agency has been approved, when OSM is in a position to act first. OSM failed to identify any provision of federal laws that would permit OSM to act in an emergency, or any other situation where the parallel state agency is already active and is acting in accordance with

the statutorily prescribed procedure. OSM failed to establish that the approved state agency was acting outside the prescribed procedures. The Court found, specifically, that the state agency had made the appropriate analysis. That agency had, of course, reached a different conclusion from that reached by OSM. Having determined that OSM had acted without jurisdiction, the Court held that OSM's cessation order was a nullity and restrained OSM from acting further as long as the approved state agency was acting in accordance with law.

Plaintiff began pumping from Meigs 31, pursuant to the plan approved by OEPA, on July 30, 1993. On August 3, 1993, however, a second federal agency, USEPA, informed Plaintiff that it would issue an administrative order to prevent further pumping until USEPA could further investigate the proposed plan and possible alternatives. USEPA indicated to Plaintiff that it would issue the administrative order on August 4, 1993.

On August 4, 1993, Plaintiff moved this Court for an order joining USEPA and certain of its officials as parties defendant in this matter and temporarily restraining USEPA from acting to prevent evacuation of Meigs 31. After a telephone hearing conducted by the Court on that date, the Court issued the requested order.

In that Order, issued on August 4, the Court found that OEPA had concluded that the proposed plan met the prerequisites under Plaintiff's NPDES permit for emergency bypass discharge. The Court further found that Plaintiff had agreed to comply with the conditions prescribed by OEPA for approval of the plan. The Court also

found that irreparable injury to Plaintiff would result from the failure of the Court to issue the requested order.

On August 4, 1993, Plaintiff also sought preliminary injunctive relief from any further attempts by OSM or USEPA to interfere in the ongoing proceedings in their respective parallel state agencies, as long as those agencies are acting in accordance with applicable law. In its August 4 Order, the Court scheduled the hearing on the motion for a preliminary injunction for August 11, 1993. The Court also issued an Order on August 4, 1993 joining USEPA and certain of its officials as parties defendant in this matter.

On August 6, 1993, USEPA moved this Court for an order vacating its August 4 Order temporarily restraining USEPA's exercise of authority at Meigs 31. The primary basis for USEPA's motion was that this Court had acted without jurisdiction in issuing its August 4 Order, because administrative orders of USEPA are not reviewable, under any circumstances, by the federal courts. USEPA contends that the courts may only review administratively imposed civil penalties. These penalties may be imposed or not imposed in the sole discretion of the USEPA. In the alternative, if SOCCO would choose to violate an administrative order to cease evacuation of the mine, USEPA could seek injunctive enforcement through the courts and, thereby, trigger judicial review. Again, the decision to enforce an administrative order through the courts is wholly discretionary with USEPA. In both scenarios, the USEPA can choose to exercise its unfettered discretion to act, at any time within four years of the events giving rise to administrative action.

This Court heard arguments on USEPA's motion at the hearing commencing on August 11, 1993.

ANALYSIS

The two motions presently before the Court raise two issues. Those issues are as follows:

1.) Whether this Court has jurisdiction to consider Plaintiff's requests for temporary and preliminary relief against USEPA; and

2.) Whether preliminary injunctive relief is warranted against OSM and USEPA.

1. The Jurisdiction of this Court.

USEPA has alleged that this Court did not have jurisdiction to issue the August 4 Order temporarily restraining USEPA from interfering with OEPA's exercise of authority at Meigs 31. Further, in response to Plaintiff's motion for a preliminary injunction, USEPA argues that the federal courts never have jurisdiction to review administrative orders of USEPA. The Court, therefore, must address the question of its own jurisdiction before considering the merits of Plaintiff's request for injunctive relief. Should the Court determine that it is without jurisdiction to issue restraining orders or to grant injunctive relief against USEPA, the Court will vacate its August 4 Order and deny the instant motion for preliminary injunction as it pertains to USEPA.

Although OSM had not formally sought reconsideration of this Court's July 30 Order restraining it from exercising authority at Meigs 31 unless the approved

state agency fails to act in accordance with law, nevertheless, by agreement of the parties and with the consent of the Court during the course of this hearing, OSM has been permitted to adduce evidence upon the issue of whether a preliminary injunction should issue as to it.

The Court has considered the arguments put forth by USEPA in its memoranda opposing the relief requested by Plaintiff and in the hearing where the Court considered the motion for preliminary injunction. Based upon the evidence adduced and the arguments of counsel, the Court can only conclude that USEPA misunderstands the basis for this Court's exercise of jurisdiction in this matter. USEPA consistently argues that this Court has no jurisdiction to review administrative orders of USEPA. While that premise is itself questionable and clearly an overly broad statement of the law, it also assumes that the proceeding in which this Court has been involved since August 4, 1993 is a review of a USEPA administrative order. Of course, that has not been the nature of the proceeding.

On August 4, Plaintiff came to this Court seeking relief from threatened exercise of authority by USEPA that Plaintiff contended was outside the jurisdiction of USEPA. This Court is not, then, reviewing the merits of any orders by USEPA. Rather, the Court is considering whether USEPA has authority to act in any fashion in the ongoing situation at Meigs 31.

The courts have long recognized that the federal courts may properly consider the authority of a federal agency and restrain and enjoin the exercise of that authority when it is outside the jurisdiction of the agency.

See, Leedom v. Kyne, 358 U.S. 184, 189 (1958); *Central Hudson Gas & Electric Corp. v. U.S. EPA*, 587 F.2d 549, 555 (2d Cir. 1978); *Coca-Cola Co. v. Federal Trade Commission*, 475 F.2d 299, 303 (5th Cir. 1973), *cert. denied* 414 U.S. 877 (1973). The Supreme Court recognized that the federal courts must act to restrain federal agency action that is beyond the jurisdiction of the agency when the agency action purports to mandate immediate action in compliance to avoid serious criminal and civil sanctions. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-54 (1967). Obviously, the basis for federal court jurisdiction in such a situation is that the harm resulting from the agency's unlawful exercise of jurisdiction may be irreparable if its actions or proposed actions are not subject to review.

This Court has previously acted to enjoin an action of a federal agency when that agency acted or threatened to act beyond its authority. In *Claridge House, Inc. v. U.S. Department of Health and Human Services*, 795 F.Supp. 1393, 1401 (S.D. Ohio 1991) (Holschuh, Chief J.), this Court found that the federal courts have jurisdiction to enjoin the Secretary of Health and Human Services from acting outside the scope of authority granted to him by federal laws and regulations. This Court determined, in *Claridge House*, that prompt action by the federal courts to enjoin agency action outside the agency's jurisdiction is an appropriate and legal exercise of jurisdiction by the federal courts.

In another recent case, this Court determined that an exercise of federal court jurisdiction similar to that sought by Plaintiff in this case is consistent with the federal question jurisdiction of the federal courts. *City of Reynoldsburg v. Carol M. Browner, Administrator, U.S. EPA*,

et al., Case No. C-2-92-882, slip op. (S.D. Ohio June 24, 1993) (Smith, J.). This Court exercises federal question jurisdiction pursuant to 28 U.S.C. §1331 whenever the question presented depends for resolution upon construction or application of federal law. *Id.* at 8 (citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921)).

USEPA has not addressed the issue of this Court's jurisdiction to review an exercise of authority by a federal agency, as opposed to the order resulting from that exercise of authority. None of the cases that USEPA relies upon address that issue. USEPA relies primarily upon two recent appellate court cases. *Southern Pines Associates v. United States*, 912 F.2d 713, 716-17 (4th Cir. 1990); *Hoffman Group, Inc.v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). These cases address the question of whether the federal courts may review federal agency orders prohibiting unlicensed or unapproved development of protected wetlands areas. In those cases, no question was before the deciding courts regarding the jurisdiction of the acting federal agency. Inasmuch as they do not address the issue that is before this Court, the cases cited by USEPA are unpersuasive. USEPA has not identified a single case that stands for the proposition that this Court may not review an exercise of agency authority that is allegedly beyond the jurisdiction of the agency.

The overwhelming weight of authority supports this Court's exercise of jurisdiction in this case. The federal courts are granted jurisdiction, pursuant to 28 U.S.C. §1331, to consider federal questions. Federal question jurisdiction exists where a question before the Court involves a substantial federal element. *See, Gully v. First National Bank*, 299 U.S. 109, 112 (1929). The question of

whether a federal agency is acting outside its statutory authority is a federal question. *See, e.g., Leedom v. Kyne, supra.*

This Court recognizes the wisdom of courts that have declined to interfere during the pendency of agency proceedings where the purpose of that intervention would be to second-guess the decisions of those agencies. Contrary to USEPA's assertions, however, the federal courts have not uniformly found that approach to be mandated. In fact, the weight of authority holds that federal courts do have jurisdiction to review agency orders, including administrative orders. The courts have been particularly willing to exercise jurisdiction where administrative remedies are inadequate or will be rendered meaningless by delay. *See, e.g., Walker v. Southern Railway,* 385 U.S. 196 (1966).

In *Abbott Laboratories, supra,* and *Darby v. Cisneros,* 61 U.S.L.W. 4679 (June 21, 1993), the Supreme Court has clarified the jurisdiction of the federal courts to review agency orders. The Court has reasoned that judicial review is permissible and appropriate unless Congress has by explicit language precluded such review. *Abbott Laboratories,* 387 U.S. at 141.

The Court notes that USEPA has argued that this Court does not have jurisdiction over final decisions from USEPA. USEPA has argued that this Court's jurisdiction is limited to enforcement proceedings upon a violation of an administrative order. The thrust of USEPA's argument is that Plaintiff could only obtain judicial review of

USEPA's cessation order by violating that order. Authority, logic, and the statutes providing the basis for this Court's jurisdiction contradict USEPA's contentions.

The Court concludes that it has properly exercised jurisdiction in this case. Plaintiff has supported its argument in favor of jurisdiction with ample citations to relevant authority. USEPA, on the other hand, has failed to address the real issue before the Court. The Court has not been directed to a single case holding that this Court does not have jurisdiction to consider whether a federal agency's action or threatened action is beyond its jurisdiction. On the contrary, courts, including the United States Supreme Court and this Court, have unanimously recognized that the federal courts do have such jurisdiction.

USEPA has attempted to construe the issue at hand as whether this Court may review an administrative order of USEPA. That is clearly not the issue in this proceeding. Nevertheless, the Court finds that USEPA has failed to support its contention that this Court may never review an order of USEPA unless the party whose actions are affected by that order violates the order and USEPA comes to the Court for enforcement or the USEPA issues an administrative civil penalty which is judicially reviewable. For that reason and those set forth above, this Court finds that it acted within its jurisdiction in issuing its August 4 Order temporarily restraining USEPA's actions.

The USEPA and OSM have cited additional cases as supplemental authorities in support of their Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction. First cited is *Board of Governors of Federal*

Reserve System v. MCorp Financial, Inc., 112 S.Ct. 459 (1991). This case turned upon the question of whether the Bankruptcy Code's automatic stay may authorize a district court to enjoin administrative proceedings against a debtor for violations of regulations occurring after the debtor had filed its bankruptcy petition. Secondarily, the case addresses the particular provisions of the Financial Institutions Supervisory Act which specifically preclude judicial review of pending Board administrative actions. *MCorp* does not address the question of judicial review of an alleged infringement by a federal agency on a Plaintiff's rights as posited by Defendants. Moreover, *MCorp* does not involve a situation of irreparable harm to the debtor nor a total deprivation of meaningful and adequate means of vindicating its constitutional and statutory rights. Justice Stevens distinguished this case from *Leedom, supra* by noting that the debtor has a means within its control to protect and enforce its statutory rights and a clear indication in the statute as to the Congressional intent to preclude judicial review. In our case, Plaintiff has no means *within its control* to protect and enforce its constitutional and statutory rights without recourse to this Court nor is there a clear expression of Congressional intent to preclude judicial review of ultra vires administrative action in either the CWA or the Congressional record.

The second cited case is *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950). Its holding, by its own terms, is limited to situations where "only property rights are concerned." *Id* at 599. This Court has addressed the fallacy of this characterization of the SOCCO's position at length elsewhere in this Order and will not restate its findings

here. Unquestionably far more is implicated in our case than mere property rights. *Ewing* is wholly inapposite.

The third cited case is *Greater Detroit Resource Recovery Authority v. U.S.E.P.A.*, 916 F.2d 317 (6th Cir. 1990), a decision authored by a colleague of this Court. It, too, is inapposite because it deals with a specific statutory provision vesting exclusive jurisdiction in the Court of Appeals to review final administrative action under the Clean Air Act. The Court did, however, note that to the extent a portion of the agency's action was not final, it might be subject to district court review pursuant to the *Leedom* exception, if there had been a manifest infringement of substantial rights irremediable by the statutorily prescribed method of review. *Id* at 323. Without belaboring the point, this Court finds the reiteration of the facts and the analysis of the dissent in *Greater Detroit* to be more persuasive and apposite to the present case.

The fourth case cited is *United States v. Town of Lowell, Indiana*, 637 F.Supp. 254 (N.D. Ind. 1985). *Lowell* deals with undisputed violations of an NPDES permit and although the state agency had entered into a consent decree with the permit holder regarding some violations, the record shows that violations continued thereafter. In *Lowell*, the state agency had failed to take action in regard to violations subsequent to the consent decree. Additionally, the Court found that none of the exigencies contemplated under the NPDES emergency bypass provisions existed in that case. Since the facts of *Lowell* differ significantly from our case, it too is inapposite.

The final case cited by Defendants is *Southern Ohio Coal Co. v. Marshall*, 464 F.Supp. 450 (S.D. Ohio 1978),

aff'd. 774 F.2d 694 (6th Cir. 1985). Amazingly, *Marshall* stands for precisely the opposite of the Defendants' stated contentions. It holds that the Southern Ohio Coal Co. (the same Plaintiff as in the case at bar) was entitled to an injunction to prevent the enforcement of an order of temporary reinstatement until the coal company had been afforded notice and an opportunity to be heard with respect thereto. Although the federal Mine Safety and Health Administration argued that the Court lacked jurisdiction "because the statutory framework establishes administrative proceedings ultimately terminating in judicial review in the Court of Appeals," *id* at 454, the Court found that it did have jurisdiction stating that the very administrative procedures by which Plaintiff would have been forced to act and which Defendants contended must be exhausted caused a present and continuing constitutional deprivation. The Court concluded that Plaintiff's procedural due process claim properly invoked the jurisdiction of the Court.

Judge Kinneary astutely observed in *Marshall* that the issue before him centered upon Plaintiff's rights prior to the issuance of the order and the fundamental requirement of due process to be heard at a meaningful time and in a meaningful manner (cite omitted). He wrote that "[t]he Supreme Court has set out three specific factors to be considered in determining whether the procedures followed in this action are constitutionally sufficient:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any,

> of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Elridge*, 424 U.S. 319 at 335, 96 S.Ct. 893 at 903, 47 L. Ed. 2d 18 (1976). *Id* at 455-456.

In reviewing the particular facts and posture of the case before him, Judge Kinneary concluded that the private interest in the case was compelling; the existing procedures unreliable; additional procedural safeguards would be of great value in minimizing the risks of erroneous deprivations of Plaintiff's interest; and the public interest or burden associated with this judicial relief was far outweighed by the first two considerations.

In *Marshall*, the government argued that Plaintiff had not shown irreparable harm. However, the Court found that the employee who was to have been temporarily reinstated was in a sensitive safety related position and his inability to perform his duties and unreliable attendance would put others at risk. Moreover, the temporary reinstatement would have been a source of lowered employee morale. Added to the inherent harm suffered by Plaintiff as a result of a deprivation of its constitutional right to due process, the totality of the circumstances supported a finding of irreparable harm. The facts of the case at bar support a finding of irreparable harm far in excess of the facts in *Marshall*.

The cases cited by Defendants are, at best, inapposite and unpersuasive and, at worst, entirely opposite from Defendant's purported position.

Accordingly, USEPA's motion to vacate this Court's August 4 Order is DENIED.

2. **USEPA's Authority**

USEPA contends that it retains authority to review every decision and order of the approved parallel state agency charged with enforcing the Clean Water Act (hereinafter referred to as the "Act" or the "CWA"). USEPA argues that the Act confers upon it virtually unlimited enforcement authority. The basis for USEPA's argument is apparently that the CWA does not explicitly say when USEPA may review decisions or orders of OEPA.

Plaintiff argues that, while Congress created USEPA as the federal enforcement agency for the CWA, Congress also recognized that primary responsibility for enforcement of the Act at the state level should, if possible, be left with the states. Accordingly, Plaintiff argues, Congress developed a procedure whereby state agencies would be approved to act as the enforcement bodies for the CWA in the states. OEPA is the approved body in Ohio. Plaintiff does *not* argue that USEPA's act of approving OEPA as a parallel divests USEPA of authority in Ohio. Plaintiff argues that USEPA's authority to act is limited, however, in most circumstances when the approved state agency has already acted or is already acting to enforce the CWA in the same situation.

USEPA obtains its enforcement authority from the Act itself. The Act also provides that when USEPA finds that a person is in violation of provisions of the Act,

USEPA through its Administrator must issue a compliance order or must notify the approved state agency and permit that agency thirty days within which to commence appropriate enforcement action. 33 U.S.C. §1319(a)(1) and (a)(3). USEPA argues that it must issue an order directing Plaintiff to cease pumping, because the CWA requires that USEPA act in certain situations. The only possible basis for USEPA's argument is the mandatory language of 33 U.S.C. §1319, which does not apply to the situation at Meigs 31.

Subsection (a)(3) of §1319 requires USEPA to issue a compliance order upon a finding that a violation has occurred. Subsection (a)(1) permits USEPA to issue such an order upon a finding of a violation. USEPA has not found a violation of the Act by Plaintiff in the pumping at Meigs 31. In fact, USEPA vigorously argues that it needs additional time to investigate the situation and determine whether a violation has occurred and a compliance order should issue. Accordingly, the Act does not *require* USEPA to act, as USEPA has argued. The Court must now consider whether the USEPA has the authority to act.

At the time of the enactment of the Act, Congress clearly expressed its intention that the states retain primary authority to enforce the Act. In the statutory policy statement that Congress incorporated in the Act, the policy of state primacy is codified. Subsection (b) of 33 U.S.C. §1251 provides as follows:

> It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution. . . .

Under the NPDES program established by 33 U.S.C. §1342, dischargers of pollutants are required to obtain permits authorizing discharges. A permit issued pursuant to 33 U.S.C. §1342 must require compliance with applicable standards and requirements of the Act. Pursuant to §1342, the responsibility for issuing NPDES permits rests with USEPA. States may establish programs in compliance with §1342(b) and the requirements of 40 C.F.R. Part 122. USEPA must relinquish primary responsibility for issuing NPDES permits to such a state agency. USEPA has delegated authority to administer the NPDES program in Ohio to OEPA.

OEPA has issued a permit to Plaintiff that establishes requirements for treatment and release of water by Plaintiff at Meigs 31. That NPDES permit provides for an emergency bypass in limited situations and in accordance with the requirements of the permit and applicable state and federal law. The plan proposed by Plaintiff for the evacuation of water from Meigs 31 was developed by Plaintiff to comply with the emergency bypass provisions of its NPDES permit. Plaintiff sought and obtained approval from OEPA for its proposed evacuation plan. The Director of OEPA found that the proposed plan complied with the permit and applicable regulations.

USEPA does not dispute that the Director of OEPA has made the appropriate analysis, nor does USEPA argue that the Director's findings were incorrect. Rather, without citing statutory authority for doing so, USEPA asserts that it may issue an order directing Plaintiff to cease its pumping operations that have been found to comply with the emergency bypass provisions of its

NPDES permit by the Director of OEPA in order to duplicate OEPA's investigation.

USEPA does not cite and the Court does not find authority for the action that it proposes to take. Undoubtedly, the CWA vests in USEPA the authority to perform an investigation. The Act does not, however, permit USEPA to order cessation of procedures approved by the parallel state agency in order to gain time to perform such an investigation.

The legislative history of the Act makes clear that in a case, such as this, where the approved state agency has already taken action, Congress intended for USEPA to act only "in cases where states and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements." Senate Report No. 92-414, 92nd Congress, 2nd Session (1972). USEPA has not argued and the evidence does not show that OEPA has failed to act expeditiously and vigorously at Meigs 31. On the contrary, the Court finds that OEPA has acted more expeditiously, by far, than USEPA, consistent with the reasons for authorizing state agencies as the primary enforcement bodies for the Act. The inescapable conclusion is that USEPA does not take issue with the haste and vigor with which OEPA has acted at Meigs 31 but with the ultimate conclusion of OEPA's investigation. The Act simply does not provide for review by USEPA of OEPA orders, where OEPA has acted vigorously, diligently, and in accordance with statutory and regulatory procedures.

The logic of the legislative policy discussed above is plain. Two agencies with concurrent jurisdiction may not

act simultaneously. In the case of the federal and state courts, one will abstain in favor of the other. Well-established principles govern when the federal courts abstain in deference to the state courts. In the case of USEPA and OEPA, the legislative intent is clearly that the state agency generally be given the first opportunity to act within its jurisdiction. When the state agency has acted, due process requires that the federal agency not simultaneously exercise jurisdiction, absent a statutory scheme providing for override authority on the part of the federal agency. The CWA does not generally provide such override authority to USEPA.

One exception to the general rule that USEPA does not have override authority over decisions of OEPA is the authority of USEPA to set aside an NPDES permit issued by one state that affects the waters of another state. In such a case, the second state may challenge the allegedly offending permit to USEPA, which has authority to vacate the permit if it concludes that a discharge under the permit will have an undue impact on interstate waters. *See Arkansas v. Oklahoma*, 112 S.Ct. 1046 (1992). USEPA has suggested that its jurisdiction is invoked in this case because the waters of West Virginia may be affected by the pumping of Meigs 31.

For three reasons, the Court does not accept that argument as a basis for USEPA's exercise of jurisdiction in this case. Foremost, USEPA has failed to produce sufficient evidence to support its contention that West Virginia waters may be unduly affected. The Court also notes that the State of West Virginia has not challenged the evacuation to USEPA. Finally, USEPA's override authority in an interstate impact situation extends only to

the disapproval of state-issue permits. The challenge in this case, if one had been made, would be to the proposed evacuation plan and not to Plaintiff's NPDES permit.

Because USEPA has been unable to establish that it has authority to act to prevent pumping at Meigs 31, and because the Court finds no basis in law or policy for such action, the Court finds that USEPA is without jurisdiction to issue an administrative cessation order and that any administrative cessation order issued by USEPA would be a nuility, absent a failure by OEPA to act vigorously and expeditiously.

Plaintiff has submitted as additional authority, the unreported decision of Judge John M. Manos of the Northern District of Ohio in *Ashland Oil, Inc., et al v. James O. McDonald, et al,* (June 11, 1980), Case No. C79-338. This Court finds the logic of that decision to be largely on point in the within matter. That case involved USEPA notices of violation (NOV) to the Plaintiffs. The question was whether Plaintiffs "may maintain ia [sic] pre-enforcement action to test the validity of notices of violation issued by the Administrator of the U.S.E.P.A." *Id* at 5. The Court concluded that they may.

In *Ashland*, the Court determined that "the Notices of Violation issued to the plaintiffs are final agency actions and that the legislative history of the Clean Air Act is not sufficiently clear and convincing to overcome the presumption of reviewability." *Id* at 5. "The fact that pre-enforcement review is not expressly stated in the Act and that the Act provides a defense to an enforcement action does not constitute clear and convincing evidence of intent to preclude pre-enforcement review." *United States*

Steel Corporation v. Fri, 364 F.Supp. 1913, 1018 [sic] (N.D. Ind. 1973).

Indeed *Abbott, supra*, 387 U.S. at 148-49, defined the "ripeness of the agency action for judicial review in terms of finality . . . as well as the nature of the issues to be resolved and the extent of immediate harm to the parties. *Ashland at 7*.

In *Ashland*, the Plaintiffs were attempting to determine if they were subject to enforcement. The issues raised were legal ones concerning the scope of USEPA's authority. The Court concluded that without pre-enforcement review the Plaintiffs faced substantial and immediate harm. The prospect of criminal penalties and a $25,000 per day fine for violation of the NOV were enough for the Court to find immediate and substantial harm.

We do not need to address the issue of finality here, nor the Administrative Procedures Act. We conclude that this matter may be resolved at a stage earlier than that. The predicate for all else is the USEPA's authority to act in the face of a state approved agency's prior action. We conclude that USEPA lacks such authority.

3. The Preliminary Injunction Standard

Before it will issue a preliminary injunction, the Court must consider four criteria:

a. whether Plaintiff has shown a strong likelihood of success on the merits;

b. whether Plaintiff has shown irreparable injury;

c. whether issuing a preliminary injunction would cause substantial harm to others; and

d. whether the public interest would be served by issuing a preliminary injunction.

a. Likelihood of success on the merits

The Court's analysis of USEPA's authority to act under the CWA addresses the issue of likelihood of success on the merits as well. To the extent that USEPA is without authority to override OEPA's approval of Plaintiff's evacuation plan, USEPA cannot succeed on the merits. *See Claridge House*, 795 F. Supp. at 1405. Nevertheless, the Court will make some additional findings on the issue of likelihood of success on the merits.

Section 123.44(m)(4) of 40 C.F.R. is the regulation that determines when emergency bypasses are permissible. That regulation provides as follows:

(i) Bypass is prohibited, and the Director may take enforcement against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to

prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.

The Director of OEPA found that the three prerequisites of 40 C.F.R. 123.44(m)(4)(i) were met and approved Plaintiff's proposed emergency bypass plan. This Court concurs with the Director of OEPA in his finding that the three prerequisites are established.

The bypass in question was clearly unavoidable to prevent severe property damage. 40 C.F.R. 123.44(m)(4)(i)(A). A significant amount of costly equipment is threatened by the water occupying Meigs 31. Additionally, the Court finds that all of the relevant evidence concerning the structural integrity of Meigs 31 suggests that the mine itself is threatened by the water. Accordingly, the loss of the majority of Plaintiff's property is the likely result of Plaintiff's being prevented from bypassing normal treatment measures.

The Court further finds that virtually all of the relevant evidence supports a finding that no alternative to the bypass was feasible. 40 C.F.R. 123.44(m)(4)(i)(B). Plaintiff explored many possible alternatives and, for legitimate reasons, rejected them. In the end, Plaintiff's choice proved to be bypass or loss of nearly all of its

property. The Court also finds that the bypass has not been made necessary by the absence of back-up equipment that should have been available in the exercise of reasonable engineering judgment. *Id.*

The Court finds no indication in the record that Plaintiff failed to submit notices as required under paragraph (m)(3) of 40 C.F.R. 123.44. 40 C.F.R. 123.44(m)(4)(i)(C). Because the Court finds that all prerequisites to the approval of the bypass have been met, the Court concludes, based upon the evidence that is before it, that the Director of OEPA correctly approved the bypass in this case. Accordingly, the Court finds that USEPA is unlikely to be successful in showing that Plaintiff's evacuation is in violation of federal law and Plaintiff is likely to succeed on the merits.

b. **Irreparable injury**

USEPA argues, inexplicably, that Plaintiff has not shown that irreparable injury will result from the Court's refusal to issue the requested preliminary injunction. The Court finds that the evidence supports no conclusion more strongly than that such harm will result.

Whenever USEPA has addressed the question, it has argued that no harm will result from the Court's refusal to issue the requested injunction. The basis for that argument is, apparently, that Plaintiff could refuse to comply with any order issued by USEPA and continue pumping, thereby avoiding injury to Meigs 31. The Court is troubled by USEPA's suggestion that Plaintiff violate an order of a federal agency. The Court finds that the proper

irreparable injury analysis would assume Plaintiff's compliance with any order issued by USEPA. On that basis, the Court will consider whether irreparable injury will result from the Court's refusal to issue the requested preliminary injunction.

The future viability of Meigs 31 is clearly threatened by the water that currently occupies the mine. Based upon the evidence in the record, the Court can only conclude that the harm resulting from the inundation is likely to become irreparable unless this Court enjoins USEPA from issuing an order designed to stop evacuation of Meigs 31 while USEPA investigates.

USEPA makes numerous arguments against a finding of irreparable harm. It first argues that Plaintiff's only loss would be economic loss, which does not, in and of itself, constitute irreparable harm. *See Ohio v. Nuclear Regulatory Commission*, 812 F.2d 288, 290-91 (6th Cir. 1987). The Court notes two deficiencies in USEPA's arguments. The evidence in the record does not show that Plaintiff's only harm will be economic. In fact, the preponderance of the evidence in the record suggests that Plaintiff is likely to suffer the loss of its entire business if Meigs 31 is not evacuated with great haste. The loss of a plaintiff's entire business is not mere economic loss and may serve as the basis for a finding of irreparable harm. Moreover, if this Court permits USEPA to act outside its authority to Plaintiff's detriment, Plaintiff will suffer the loss of its constitutional right to due process. Action by a federal agency beyond its authority is *per se* an irreparable injury. *See, e.g., Claridge House*, 795 F. Supp. at 1405.

USEPA also argues that Plaintiff is not entitled to injunctive relief, because Plaintiff has allegedly set in motion the chain of events leading to its injury. USEPA alleges that the failure of the bulkhead between Raccoon 3 and Meigs 31 was the cause of the inundation of water in Meigs 31 and that because Plaintiff's injury is self-inflicted no injunctive relief may issue. *See San Francisco Real Estate v. Real Estate Investment Trust of America*, 692 F.2d 814, 818 (1st Cir. 1982). USEPA has offered no evidence to support that suggestion, and the Court is unwilling to draw such a conclusion without evidence to support it. In fact, OSM's own draft report (Exhibit 58) indicates that the cause of the inundation was "a roof fall."

c. **Substantial harm to others**

USEPA has argued that the harm to others that would result from the evacuation of Meigs 31 is substantial and outweighs any potential harm to Plaintiff. The Court has found that the harm to Plaintiff that will result from the Court's failure to issue the requested preliminary injunction is extraordinarily serious. In order to convince the Court that it should not issue the injunction, USEPA would be required to show the Court that the harm to others would be equally or more significant.

USEPA has urged the Court to consider harm to the environment when it considers the likelihood that harm will result to others from the issuance of the injunction. The Court recognizes that such a consideration is appropriate. Nevertheless, the Court finds that USEPA has not shown that any damage to the environment resulting

from the evacuation of Meigs 31 would be either substantial or irreparable. The Court does not suggest that the harm to the environment is not a cause for concern. The preponderance of the evidence shows, however, that any such injury is remediable and that Plaintiff will take appropriate actions to speed the repair of the environment that would otherwise occur naturally over a period of, at most, two years. Furthermore, USEPA has offered no evidence showing that an endangered or threatened species is currently in danger as a result of the pumping.

In considering potential harm to others, the Court must also consider any potential harm to persons living near the waterways into which Plaintiff is evacuating the water from Meigs 31. USEPA produced witnesses who testified that they anticipated being affected by the evacuation. None of those witnesses testified that she or he was presently being harmed in any significant manner. Further, Plaintiff has offered to take every precaution against significant harm to others. Plaintiff has offered to provide alternate drinking water for livestock, for example. The Court concludes that the injury to others, including the environment, that might result from the evacuation of Meigs 31 according to Plaintiff's plan is insignificant when compared to the harm that will result to Plaintiff if the mine is not evacuated quickly.

d. **Public policy**

The public policy concerns implicated by the evacuation of Meigs 31 are addressed in the preceding sections of this Order. The Court will not restate its findings. The Court concludes that the public policy of preserving

Plaintiff's business and the jobs of Plaintiff's employees outweighs the opposing public policy, notwithstanding the Court's recognition of the importance of safeguarding the environment against irreparable harm. Because the Court finds that, on balance, the criteria for issuance of a preliminary injunction are satisfied, the Court will issue the requested preliminary injunction with respect to USEPA.

4. Applicability of the Preliminary Injunction to OSM

The Court ruled in its July 30 Order that OSM did not have jurisdiction to issue a cessation order when the approved state agency was already acting. Based upon that ruling, the Court issued the Order temporarily restraining OSM from acting, as long as the appropriate state agency was acting in accordance with the applicable statutory procedures.

In determining whether to preliminarily enjoin OSM from attempting to exercise jurisdiction while its parallel state agency is acting, this Court considers the four criteria set forth above. The Court's findings and conclusions, as they apply to USEPA, apply equally to OSM.

The Court finds that Plaintiff's success on the merits is virtually insured, because the appropriate state agency has acted in accordance with law prior to any action by OSM. Applicable law does not vest jurisdiction in OSM to override the factual conclusions of the parallel state agency if those conclusions are the result of the statutorily-required analysis. Accordingly, as regards OSM,

the first criteria for issuance of a preliminary injunction favors the issuance of such relief.

The Court's analyses with regard to the other three criteria are identical to that set forth above, and the Court will not restate its findings and conclusions. The Court concludes that the criteria for issuance of a preliminary injunction, on balance, favor of the issuance of such relief with respect to OSM.

CONCLUSION

For the reasons and based upon the findings set forth above, the Court hereby **DENIES** USEPA's motion to vacate this Court's August 4 Order, and **GRANTS** Plaintiff's motion for a preliminary injunction. Neither USEPA nor OSM shall act to effect the cessation of pumping at Meigs 31 unless their respective parallel approved state agencies fail to act vigorously, expeditiously, and in accordance with law.

The bond previously set in this action shall continue in full force and effect.

This order shall continue in effect until the final determination of this case or until further order of the Court.

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

No. 93-3878

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOUTHERN OHIO COAL COMPANY, Plaintiff-Appellee, v. DEPARTMENT OF THE INTERIOR, OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, ET AL., Defendants-Appellants.	)	ORDER (Filed May 31, 1994)

BEFORE: KENNEDY and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

AMENDMENT V – GRANT JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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30 U.S.C. § 1201. Congressional findings [SMCRA § 101]

The Congress finds and declares that –

* * *

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States;

* * *

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30 U.S.C. § 1202. Statement of purpose [SMCRA § 102]

It is the purpose of this chapter to –

* * *

(g) assist the States in developing and implementing a program to achieve the purposes of this chapter;

* * *

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30 U.S.C. § 1253. State programs [SMCRA § 503]

(a) Regulation of surface coal mining and reclamation operations; submittal to Secretary; time limit; demonstration of effectiveness

Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 1271 and 1273 of this title and subchapter IV of this chapter, shall submit to the Secretary, by the end of the eighteen-month period beginning on August 3, 1977, a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes through –

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits

concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this chapter, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this chapter;

(4) a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting the requirements of this subchapter for the regulations of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 1272 of this title provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and[1]

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter.

* * *

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[1] So in original.

30 U.S.C. § 1271. Enforcement [SMCRA § 521]

(a) Notice of violation; Federal inspection; waiver of notification period; cessation order; affirmative obligation on operator; suspension or revocation of permits; contents of notices and orders

(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the secretary is a result of a previous federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall imediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to paragraph (5) of this subsection. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

* * *

30 U.S.C. § 1275. Review by Secretary [SMCRA § 525]

* * *

(c) Temporary relief; issuance of order or decision granting or denying relief

Pending completion of the investigation and hearing required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief from any notice or order issued under section 1271 of this title, a Federal program or the Federal lands program together with a detailed statement giving reasons for granting such relief. The Secretary shall issue an order or decision granting or denying such relief expeditiously: *Provided,* That where the applicant requests relief from an order for cessation of coal mining and reclamation operations issued pursuant to paragraph (2) or (3) of subsection (a) of section 1271 of this title, the order or decision on such a request shall be issued within five days of its receipt. The Secretary may grant such relief, under such conditions as he may prescribe, if –

(1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and

(3) such relief will not adversely affect the health of safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

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30 U.S.C. § 1276. Judicial review [SMCRA § 526]

(a) Review by United States District Court; venue; filing of petition; time

(1) Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court

within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

(2) any order or decision issued by the Secretary in a civil penalty proceeding or any other proceeding required to be conducted pursuant to section 554 of Title 5 shall be subject to judicial review on or before 30 days from the date of such order or decision in accordance with subsection (b) of this section in the United States District Court for the District in which the surface coal mining operation is located. In the case of a proceeding to review an order or decision issued by the Secretary under the penalty section of this chapter, the court shall have jurisdiction to enter an order requiring payment of any civil penalty assessment enforced by its judgment. This availability of review established in this subsection shall not be construed to limit the operations of rights established in section 1270 of this title.

(b) Evidence; conclusiveness of findings; orders

The courts shall hear such petition or complaint solely on the record made before the Secretary. Except as provided in subsection (a) of this section, the findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further actions as it may direct.

(c) Temporary relief; prerequisites

In the case of a proceeding to review any order or decision issued by the Secretary under this chapter, including an order or decision issued pursuant to subsection (c) or (d) of section 1275 of this title pertaining to any order issued under paragraph (2), (3), or (4) of subsection (a) of section 1271 of this title for cessation of coal mining and reclamation operations, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if –

(1) all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;

(2) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(3) such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources.

(d) Stay of action, order, or decision of Secretary

The commencement of a proceeding under this section shall not, unless specifically ordered by the court, operate as a stay of the action, order, or decision of the Secretary.

(e) Action of State regulatory authority

Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial

review by a court of competent jurisdiction in accordance with State law, but the availability of such review shall not be construed to limit the operation of the rights established in section 1270 of this title except as provided therein.

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33 U.S.C. § 1251. Congressional declaration of goals and policy [FWPCA § 101]

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under section 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies

and municipalities in connection with the prevention, reduction, and elimination of pollution.

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33 U.S.C. § 1319. Enforcement [FWPCA § 309]

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so

notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person –

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this

subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the

date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

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33 U.S.C. § 1342. National Pollutant discharge elimination system [FWPCA § 402]

* * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters

within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of section 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) to issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pre-treatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

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Ohio Revised Code § 1513.02 Duties of Chief.

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(D)(1) When the chief or his authorized representative determines that any condition or practice exists or that any permitee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause, significant, imminent environmental harm to land, air, or water resources, the chief or his authorized representative shall immediately order the cessation of coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. The cessation order shall remain in effect until the chief or his authorized representative determines that the condition, practice, or violation has been abated, or until the order is modified, vacated, or terminated by the chief or his authorized representative pursuant to division (D)(4) of this section or by the reclamation board of review pursuant to section 1513.13 of the Revised Code. When the chief or his authorized representative finds that the ordered cessation of coal mining and reclamation operations or any portion thereof will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the chief or his authorized representative shall, in addition to the cessation order, order the operator to take whatever steps the chief or his authorized representative considers necessary to abate the imminent danger or the significant environmental harm.

* * *

Ohio Revised Code § 1513.13 Appeal of violation order or decision to reclamation board of review.

(A)(1) Any person having an interest that is or may be adversely affected by a notice of violation, order, or decision of the chief of the division of reclamation, except a show cause order or an order that adopts a rule, or by any modification, vacation, or termination of such a notice, order, or decision may appeal by filing a notice of appeal with the reclamation board of review for review of the notice, order, or decision within 30 days after the notice, order, or decision is served upon the person or within thirty days after its modification, vacation, or termination and by filing a copy of the notice of appeal with the chief within three days after filing the notice of appeal with the board. The notice of appeal shall contain a copy of the notice of violation, order, or decision complained of and the grounds upon which the appeal is based. The board has exclusive original jurisdiction to hear and decide such appeals. The filing of a notice of appeal under this division does not operate as a stay of any order, notice of violation, or decision of the chief.

(2) The permittee, the chief, and other interested persons shall be given written notice of the time and place of the hearing at least five days prior thereto. The hearing shall be of record.

(3) Any person authorized under this section to appeal to the board may request an informal review by the chief or his designee by filing a written request with the chief within thirty days after a notice, order, decision, modification, vacation, or termination is served upon the person. Filing of the written request shall toll the time for

appeal before the board but shall not operate as a stay of any order, notice of violation, or decision of the chief. The chief's determination of an informal review is appealable to the board under this section.

(B) The board shall affirm the notice of violation, order, or decision of the chief unless the board determines that it is arbitrary, capricious, or otherwise inconsistent with law, in which case the board may modify the notice of violation, order, or decision or vacate it and remand it to the chief for such further proceedings as the board may direct.

The board shall conduct hearings and render decisions in a timely fashion, except that:

(1) When the appeal concerns an order for the cessation of coal mining and reclamation operations issued pursuant to division (D)(1) or (2) of section 1513.02 of the Revised Code, the board shall issue its written decision within thirty days after the receipt of the appeal unless temporary relief has been granted by the chairman pursuant to division (C) of this section;

(2) When the appeal concerns an application for a permit under division (I) of section 1513.07 of the Revised Code, the board shall hold a hearing within thirty days after receipt of the notice of appeal and issue its decision within thirty days after the hearing;

(3) When the appeal concerns a decision of the chief regarding release of bond under division (F) of section 1513.16 of the Revised Code, the board shall hold a hearing within thirty days after receipt of the notice of appeal and issue its decision within sixty days after the hearing.

(C) The chairman of the board may, under conditions he prescribes, grant temporary relief he considers appropriate pending final determination of an appeal if all of the following conditions are met:

(1) All parties to the appeal have been notified and given an opportunity for a hearing to be held in the locality of the subject site on the request for temporary relief and the opportunity to be heard on the request;

(2) The person requesting relief shows that there is a substantial likelihood that he will prevail on the merits;

(3) The relief will not adversely affect public health or safety or cause significant imminent environmental harm to land, air, or water resources.

The chairman shall issue a decision expeditiously, except that where the applicant requests relief from an order for the cessation of coal mining and reclamation operations issued pursuant to division (D)(1) or (2) of section 1513.02 of the Revised Code, the decision shall be issued within five days after its receipt.

Any party to an appeal filed with the reclamation board of review who is aggrieved or adversely affected by a decision of the chairman to grant or deny temporary relief under this section may appeal that decision to the reclamation board of review. The board may confine its review to the record developed at the hearing before the chairman.

The appeal shall be filed with the board within thirty days after the chairman issues his decision. The board shall issue a decision as expeditiously as possible, except that where the appellant requests relief from an order for

the cessation of coal mining and reclamation operations issued pursuant to division (D)(1) or (2) section 1513.02 of the Revised Code, the decision of the board shall be issued within five days after receipt of the notice of appeal.

The board shall affirm the decision of the chairman granting or denying temporary relief unless it determines that the decision is arbitrary, capricious, or otherwise inconsistent with law.

* * *

Subpart C – Permit Conditions

40 C.F.R. § 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

* * *

(m) *Bypass* – (1) *Definitions.* (i) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

(ii) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) *Bypass not exceeding limitations.* The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) *Notice* – (i) *Anticipated bypass.* If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) *Unanticipated bypass.* The permittee shall submit notice of an unanticipated bypass as required in paragraph (1)(6) of this section (24-hour notice).

(4) *Prohibition of bypass.* (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.

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